(28,069)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 712.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PLAINTIFF IN ERROR,

vs.

MARY S. LIEBING.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

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UNITED STATES OF AMERICA,
State of Missouri, ss:

Be it remembered That, heretofore, to-wit, on the 15th day of August, 1919, there was filed in the office of the clerk of the Supreme Court of the State of Missouri, in a cause between Mary S. Liebing, Respondent, and The Mutual Life Insurance Company of New York, Appellant, No. 21,639, a certified copy of the judgment of the Circuit Court of the City of St. Louis, and of the order of said circuit court granting an appeal from said judgment to the Supreme Court of the State of Missouri, which said certified copy of said judgment and of said order granting an appeal in said cause is in the words and figures following, to-wit:

STATE OF MISSOURI,
City of St. Louis, ss:

Be it remembered, that heretofore to-wit, at the April Term Nineteen Hundred and Nineteen of the Circuit Court, City of St. Louis, within and for the City and State aforesaid, and on the Twelfth day of May, 1919, it being the Twenty-Second day of the April Term 1919 of said Court, the following proceedings were had in cause No. 82584 Series "A" of the causes in said Court, wherein Mary S. Liebing is plaintiff and The Mutual Life Insurance Company of New York is defendant, to-wit:

Monday, May 12th, 1919.

82584-A.

MARY S. LIEBING

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

Now at this day come the parties hereto by their respective attorneys and this cause coming on for hearing, comes also a jury, to-wit: "John Compton, Hugo Cotta, Emil Ganter, Joseph Goeppert, Henry Grote, Walter Hansen, Emil Lutz, George Mueller, William Peterson, Edward Ratz, Joseph Roddy, Byron Sine," twelve good and lawful men, duly elected, tried and sworn, well and truly to try the issues herein joined, and a true verdict render according to the law and the evidence; thereupon the trial of this cause progressed and not being finished at the hour of adjournment, the further trial is laid over until to-morrow morning at 10 o'clock.

And at the said April Term 1919 and on May 13th, 1919, it being the 23rd day of the April Term, 1919 of said Court, the following further proceedings were had in said cause to-wit:

Tuesday, May 13th, 1919.

82584-A.

MARY S. LIEBING

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

Now at this day come again the parties hereto by their respective attorneys and file herein a stipulation as to certain evidence and come also again the jurors sworn and empannelled herein, and the trial of this cause is resumed and progressed and not being finished at the hour of adjournment, the further trial is laid over until to-morrow morning at 10 o'clock.

And at the said April Term, 1919 and on May 14th 1919 it being the 24th day of the April Term 1919 of said Court, the following further proceedings were had in said cause to-wit:

Wednesday, May 14th, 1919.

82584-A.

MARY S. LIEBING

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

Now at this day come again the parties and jurors as aforesaid and the trial of this cause is resumed and progressed and at the close of the entire case, the defendant files and presents to the Court an application and an affidavit in support thereof for a change of venue herein, upon consideration of which it is ordered that said application be denied, and the trial being fully terminated the cause is submitted to the jury and the jurors retire to consider of their verdict and having agreed — a verdict the jurors aforesaid upon their oaths as aforesaid, say:

"We the jury in the above entitled cause, do find the issues joined in favor of the plaintiff and against the defendant, and we assess plaintiff's damages at the sum of One Hundred seven thousand five hundred forty two & 09/100 Dollars as follows, to-wit:

Amount due under policy	$52,911.43
Interest	39,630.66
Damages	5,000.00
Attorney's Fees	10,000.00
Total	$107,542.09

EMIL A. LUTZ,
Foreman.
H. A. GROTHE.
J. RODDY.
J. H. G. COMPTON.
WM. F. PETERSON.
EDW. RATZ.
JOSEPH A. GOEPPERT.
EMIL GANTER.
HUGO V. COTTA.
B. C. SINE.
W. A. HANSON."

Wherefore, it is considered and adjudged by the Court that the plaintiff have and recover of the defendant, the total damages aforesaid as assessed, to-wit: said sum of One Hundred Seven Thousand Five Hundred Forty-two and 09/100 ($107,542.09) Dollars, together with costs of suit and have therefor execution.

Verdict and Instruction Filed.

And afterwards to-wit at the June Term 1919 of said Court, the following further proceedings were had in said cause to-wit:

Tuesday, July 1st, 1919.

82584-A.

MARY S. LIEBING

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

Now this day comes the defendant by its attorney and upon its motion and for good cause shown, it is ordered that the defendant have 120 days additional time within which to file its bill of exceptions herein; thereupon the defendant files and presents to the Court an affidavit for appeal and prays an appeal in the above entitled cause, and for an order fixing the amount of the appeal bond to be given by said defendant; whereupon the Court, doth fix the amount of said bond at the sum of $125,000.00 and the Court having seen and examined said affidavit, doth order that an appeal be

and is hereby allowed the defendant to the Supreme Court of the State of Missouri, from the judgment or decision of the Court heretofore rendered herein.

STATE OF MISSOURI,
City of St. Louis, ss:

I, Nat Goldstein, Clerk of the Circuit Court, City of St. Louis, within and for the City and State aforesaid, certify the above and foregoing to be a full, true and complete transcript of the judgment in the above entitled cause, showing the term, day of the term month and year in which the same was rendered, and also, of the order granting an appeal in said cause, as fully as the same remain of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at office in the City of St. Louis, this 4th day of August, 1919.

[SEAL.]

NAT GOLDSTEIN,
Clerk, Circuit Court.

6 And thereafter, and on the 4th day of December, 1919, the said appellant filed its Abstract of the Record in said cause, which said abstract of the record is in the words and figures following, to-wit:

In the Supreme Court of Missouri, October Term, 1919.

In Banc.

No. 21639.

MARY S. LIEBING, Respondent,

vs.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Appellant.

Appeal from the Circuit Court of the City of St. Louis, Mo.

APPELLANT'S ABSTRACT OF THE RECORD.

This suit was instituted on the 9th day of December, 1912, in the Circuit Court of the City of St. Louis, Missouri. A trial was had on the 15th day of May, 1913, which resulted in the plaintiff's being nonsuited, and from this decision the plaintiff appealed
7 to this Court which reversed the decision of the court below on the nonsuit and remanded the case for trial on the merits.

See Liebing v. Mutual Life Ins. Co., 269 Mo. 509.

After the case was remanded the plaintiff filed an amended petition on February 2nd, 1917, and a second amended petition on February 3rd, 1917. Part of the second amended petition was stricken out on motion of the defendant, and the case then went to trial on the following pleadings:

Second Amended Petition.

(Omitting Caption.)

Mary S. Liebing states that she is the plaintiff in the above-entitled cause, and having first obtained leave of court, files this, her second amended petition. And for said second amended petition plaintiff states that the defendant is now and was at all of the dates hereinafter mentioned a corporation duly organized and incorporated under and by virtue of the laws of the State of New York; that at all of said dates and prior thereto defendant was and still is a resident and citizen of the State of Missouri, and pursuant to the laws of the State of Missouri defendant maintains and has at all of said dates maintained several offices in the State of Missouri; that at all of said dates, prior and subsequent thereto, defendant was and now is transacting the

business of life insurance in the State of Missouri; that the de-
8 fendant thereby became subject to and thereby agreed to be bound by all the laws of the State of Missouri then in force or thereafter enacted.

Plaintiff further states that on or about the 29th day of September, 1901, at the City of Macon, State of Missouri, Frederick W. V. Blees made written application to defendant for a policy of insurance, and upon said written application, on or about the 29th day of September, 1901, defendant, at the City of Macon, County of Macon, Missouri, issued its written policy of insurance number 1,207,072 (which is on file and made a part hereof as much so as if fully set forth herein), by which policy, in consideration of the premiums therein stated, defendant insured the life of said Frederick W. V. Blees and promised in case of his death and acceptance of due proofs thereof by defendant to deliver to his executors, administrators or assigns, fifty bonds, each of the denomination of one thousand dollars, to be issued by defendant and payable twenty years from the first day of January or July next ensuing the date thereof, in gold coin of the United States of America, of the present standard of weight and fineness, with interest thereon at the rate of 5 per centum per annum, payable in like gold coin, semi-annually on the first day of January and July, or to pay to said executors, administrators or assigns the sum of sixty-five thousand two hundred and fifty gold dollars in lieu of the issuance of said fifty thousand dollars of gold bonds at the option of said executors, administrators or assigns; that at the time said policy was issued, prior thereto and up to his death, Frederick W. V. Blees, the insured, was a resident and citizen of
the State of Missouri, and that he died on or about the 8th day
9 of September, 1906, and that every condition of said policy was complied with by the insured during his lifetime, and by the plaintiff since his death; that plaintiff was the wife of said insured and assignee of said policy, and she is now and was at all of the dates herein named a resident and citizen of the State of Missouri.

Plaintiff further states that Frederick W. V. Blees, the insured, continued to pay premiums on said policy until the 29th day of September, 1905, when the said insured discontinued the payment of further premiums; that at the time of lapse, namely, on the 29th day of September, 1905, more than three full annual premiums had been paid on said policy, to wit: four annual premiums had been paid thereon, and the net value of said policy, at date of lapse—the 29th day of September, 1905—under the non-forfeiture statutes of the State of Missouri in such cases made and provided, amounted to the sum of eleven thousand two hundred and thirty dollars and eighty-three cents.

Plaintiff further states that on or about the 12th day of October, 1904, Frederick W. V. Blees, the insured, and the plaintiff herein, at the City of Macon, in the State of Missouri, jointly made application to defendant for a loan of nine thousand five hundred and fifty dollars, and at said city and state the said Frederick W. V. Blees, the insured, and plaintiff herein signed and executed a loan agreement therefor, and on or about the 12th day of October, 1904, the

defendant, at said City of Macon, Missouri, pursuant to said application and loan agreement, lent the said insured and plaintiff said sum of nine thousand five hundred and fifty dollars at an agreed rate of interest of 5 per cent per annum; that the proceeds
10 of said loan were distributed and applied in the City of Macon, Missouri, as follows, to wit: Four thousand two hundred and ninety-one dollars and fifty cents was applied to pay the annual premium due the 29th day of September, 1904, thus paying the premiums on said policy to the 29th day of September, 1905; four hundred and sixty-eight dollars was applied to pay interest on said loan to the 29th day of September, 1905, and to pay interest on said premium; and four thousand seven hundred and ninety dollars and fifty cents was paid to the insured and plaintiff herein.

Plaintiff further says that, as above stated, at the date of lapse, namely, on the 29th day of September, 1905, the net or reserve value of said policy, calculated under the non-forfeiture statutes of the State of Missouri, in such cases made and provided, amounted to the sum of eleven thousand two hundred and thirty dollars and eighty-three cents; that three-fourths of said net value is eight thousand four hundred and twenty-three dollars and twelve cents that deducting four thousand seven hundred and fifty-nine dollars and fifty cents therefrom (which is the aggregate amount applied to pay the premium due on the 29th day of September, 1904, and to pay interest on said loan and premium) leaves three thousand six hundred and sixty-three dollars and sixty-two cents, which sum ($3,663.62), taken or applied as a net single premium, as provided by the Missouri non-forfeiture statutes in force when said policy was issued, extends said policy in full force for the full amount written therein from date of lapse, September 29th, 1905, for a period of four years, nine months and eighteen days, and the insured died within
11 said period, for he died on the 8th day of September, 1906; that is, eleven months and ten days from the 29th day of September, 1905, date of lapse.

Plaintiff further states that she has elected to take cash in lieu of bonds.

Plaintiff further states that at the time said policy was issued the insured was of the age of 41 years, and the highest gross annual ordinary life premium per thousand ever charged by defendant on a policy issued at age 41 years is thirty-four dollars and sixteen cents (this is equal to or greater than the ordinary life premium mentioned in the Missouri nonforfeiture statutes); that the gross annual ordinary life premium on the policy in suit, calculated at the rate of thirty-four dollars and sixteen cents per thousand is the sum of two thousand two hundred and twenty-eight dollars and ninety-four cents ($2,228.94), and the interest thereon at the rate of 6 per cent per annum from the date when due (the 29th day of September, 1905) to the day the insured died (the 8th day of September, 1906—11 months, 10 days) amounts to the sum of one hundred and twenty-five dollars and ninety-eight cents ($125.98).

Plaintiff further states that interest at the rate of 5 per cent per

annum is due and unpaid on said loan of nine thousand five hundred and fifty dollars from the 12th day of October, 1905, to the 8th day of September, 1906, the day the insured died; that is, ten months twenty-seven days, and amounts to the sum of four hundred and thirty-three dollars and sixty-five cents ($433.65).

Plaintiff further states that said unpaid gross annual ordi-
12 nary life premium ($2,228.94), and interest thereon ($125.98), together with said loan ($9,550.00), and interest thereon ($433.65), aggregate the sum of $12,338.57, and that the same may be deducted from the face amount of said policy ($65,250.00), being, as plaintiff believes, a proper deduction therefrom under the non-forfeiture laws of the State of Missouri, thus reducing said policy to the sum of $52,911.43.

Plaintiff further states that at the City of Macon, Missouri, Frederick W. V. Blees duly assigned said policy to plaintiff and said defendant accepted said assignment and acquiesced therein in said city and state; that the premiums which were paid on said policy were thus paid to defendant in the State of Missouri.

Plaintiff further states that on divers occasions prior to the institution of this action, especially on or about the 3rd day of November, 1906, plaintiff duly demanded of defendant payment of the amount due under said policy, but said defendant, on sundry occasions, particularly on the 20th day of November, 1906, vexatiously refused to pay the same or any part thereof, and then and there vexatiously disclaimed all liability under said policy.

Wherefore, plaintiff prays for judgment against defendant for the sum of fifty-two thousand nine hundred and eleven dollars and forty-three cents, with interest thereon at the rate of 6 per cent per annum from the 20th day of November, 1906 (the date defendant denied liability under said policy), together with 10 per cent on the
13 amount due under said policy as damages, and a reasonable fee for her attorney's services in preparing and prosecuting this action because of the vexatious refusal of defendant to pay said policy.

JAMES J. O'DONOHOE,
Attorney for Plaintiff.

Received copy this 3rd day of February, 1917.
FORDYCE, HOLLIDAY & WHITE,
Attorneys for Defendant.

Answer to Second Amended Petition.

(Omitting Caption.)

Now comes the Mutual Life Insurance Company of New York, defendant herein, and, leave of Court having been obtained, files its answer to the second amended petition of the plaintiff heretofore filed herein, and for such answer admits that the defendant is now, and

has been at all of the dates in said petition mentioned, a corporation duly organized and incorporated under and by virtue of the laws of the State of New York, and defendant denies each and every, all and singular, the other allegations in said seconded amended petition contained.

Wherefore, having answered, defendant prays to be hence dismissed.

And, for its first affirmative answer and defense, and without waiving the denial above pleaded, defendant states that on the 29th day of September, 1901, the defendant issued its certain policy of insurance, numbered 1,207,072, upon the life of one Frederick
14 W. V. Blees, whereby, in consideration of an anual deposit or premium of four thousand, two hundred ninety-one dollars and fifty cents ($4,291.50), the defendant agreed to deliver gold bonds to the value of $50,000.00 to the insured, his executors, administrators or assigns, provided that the delivery of said bonds should be conditional upon the surrender of said policy after it should have been maintained according to its terms in full force and effect until its termination and the acceptance of satisfactory proofs of death of the said Frederick W. V. Blees, made in the manner provided by the policy. Said policy is herewith filed and marked "Exhibit A."

Defendant further states that the said Frederick W. V. Blees paid the deposits upon said policy, due on the 29th day of September, 1901, the 29th day of September, 1902, the 29th day of September, 1903, and the 29th day of September, 1904, but that neither said Frederick W. V. Blees, or any person for him, paid the deposit on said policy on the 29th day of September, 1905.

Defendant further states that, on or about the 2nd day of March, 1904, the said Frederick W. V. Blees assigned his interest in said policy to the plaintiff, at that time his wife, Mary S. Blees, and this assignment was acknowledged by the defendant.

Defendant further states that thereafter, to wit, on or about the 10th day of October, 1904, the plaintiff and said Frederick W. V. Blees made application to the defendant, at its home office, in the City of New York and State of New York, for a loan upon said policy, and that, as a result thereof, on October 12th, 1904, a loan agreement in writing was made between the defendant and the said
15 insured and the plaintiff whereby the insured and plaintiff transferred and assigned said policy to the defendant for the security of said loan, which agreement is herewith attached, marked "Exhibit B," and is in the words and figures following, to wit:

"This agreement, made this 12th day of October, 1904, between the Mutual Life Insurance Company of New York, party of the first part, hereinafter called the Company, and Frederick W. V. and Mary S. Blees, parties of the second part, witnesseth:

The Company agrees to loan to the parties of the second part the sum of ninety-five hundred and fifty dollars, apportioned as follows:

To pay premiums on policy No. 1,207,072 to 29th day of September, 1905	$4,291.50
Interest at 5 per cent (adjusted also for interest premiums)	468.00
Balance by Company's check	4,790.50
	$9,550.00

The receipt of the foreging amount as a loan is hereby acknowledged upon the pledge as hereinafter set forth of policy No. 1,207,072 in said Company. And the said parties of the second part agreed to repay the said sum of $9,550.00 to the Company at its head office, Nassau, Cedar and L-berty streets, in the City of New York, on the 29th day of September, 1905.

In consideration of the amount of said loan the parties of the second part hereby assign, transfer and set over all of their right, title and interest in and to said policy No. 1,207,072 issued by said
16 Company on the life of Frederick W. V. Blees, together with any and all moneys which may be or become payable under the same, to the Company as collateral security for the payment of said loan, with interest, the said parties of the second part will forever warrant and defend the title of the said Company to the said policy.

In the event of default in the payment of said loan on the date hereinabove mentioned the Company is hereby authorized, at its option, without notice and without demand for payment, to cancel said policy, and apply the customary cash surrender consideration then allowed by the Company for the surrender for cancellation of similar policies, namely, $9,550, to the payment of said loan, with interest, the balance, if any, to be payable to the parties entitled thereto on demand, or the Company may, at its own option, renew the said loan for one year or less period on the written request of any one of the parties of the second part hereto, and without further notice to any one of the parties of the second part.

In witness whereof, the said parties have executed these presents the day and year first above written.

(Signed) FREDERICK W. V. BLEES.
(Signed) MARY S. BLEES.

Witness:
(Signed) D. A. PAYSON.
Witness:
(Signed) G. EUGENE LAIN."

Defendant further states that said loan agreement had, prior to said date, been duly signed by the insured and the plaintiff in the State of Missouri, and that the same had then been forwarded
17 from Missouri to the defendant at its home office in New York, where it was made payable; that it was then examined, approved and accepted by this defendant at its home office in said City of New York and State of New York, and that the defendant

then loaned to the said insured and the plaintiff the said sum of $9,550.00, to be repaid to the defendant at its office in the City of New York on the 29th day of September, 1905; that the proceeds of said loan were then and there applied as in said agreement provided; that the premium due September 29th, 1904, was duly paid by the application thereto of that much of the money covered by said loan agreement, to wit, $4,291.50; that the defendant also there at the time applied to the payment of the interest on said loan the sum of $468.00, as in said loan agreement provided, and that the defendant then forwarded from its home office, in the City of New York, and caused to be delivered to the insured and the plaintiff the premium receipt aforesaid, with a statement of said interest thus paid and a check for $4,790.50, the balance of said loan which was to be paid in cash, said check being drawn by the defendant on the American Exchange National Bank of New York City, payable to the order of plaintiff and the insured, by both of whom it was duly endorsed, and said check was then duly paid in the City of New York upon its being forwarded and presented there for payment shortly afterward.

That after said 12th day of October, 1904, the said loan agreement and said policy pledged to secure the same remained in the
18 possession of the defendant at its home office in the City and State of New York.

That by the terms of said loan agreement the defendant became and was entitled upon non-payment of said loan, without notice and without demand, to cancel said policy and apply the customary cash-surrender consideration then allowed by the company for the surrender for cancellation of similar policies, namely, $9,550.00, to the payment of said loan with interest.

That neither the insured nor the plaintiff paid either the said loan, when the same became due, to wit, on the 29th day of September, 1905, or the premium due on said policy on the same day, and that neither said loan nor premium were by them ever paid.

That by reason of the failure of the insured and the plaintiff to pay said loan at its maturity on September 29th, 1905, the defendant, on or about November 15th, 1905, canceled said policy and applied the surrender value thereof, namely, the sum of $9,550, to the payment of said loan; that the said sum of $9,550.00 was the full surrender value of said policy and the full amount to which the plaintiff was entitled by reason of the payment of the premiums theretofore paid thereon, and after application of the said sum of $9,550.00 to the payment of said loan there remained nothing to be paid either the insured or the plaintiff on account of said policy.

The defendant further avers that it was at said times, and has ever since been, the common and unwritten law of the State of New York that when a husband procured an insurance policy to
19 be issued upon his life, for the benefit of and payable to the wife, that they had the right and power to unite in pledging the policy to the insurance company issuing it, to secure a loan procured from such company, and to agree that in case of default in payment of the loan the company might, without demand or notice, cancel the policy and apply the cash-surrender value of the policy as fixed therein to the satisfaction of the loan and account to the

parties for the balance of such cash surrender value, if any there should be; that it was then, there and has ever since been the common and unwritten law of the State of New York that such a loan agreement was lawful and valid according to its terms, and the company was entitled upon default in payment of the loan, without demand or notice, to cancel such policy and apply the cash-surrender value thereof as specified in the policy to the payment of the loan and account to the parties for the surplus, if any, without any notice of such cancellation; that under and according to the law of New York, both common and statutory, as it then was and has ever since been, said loan agreement was lawful, valid and effective according to its terms, and the parties thereto were fully bound thereby. That at the time of the execution of said policy and thenceforward until the present time there was in New York in full force and effect, duly enacted, the following statute relative to the rights of a married woman:

"New York Laws of 1896, Chapter 272, Section 21—Powers of Married Woman.—A married woman has all the rights in respect to property, real or personal, and the acquisition, use, enjoyment and disposition thereof, and to make contracts in respect
20 thereto with any person, including her husband, and to carry on any business, trade or occupation, and to exercise all powers and enjoy all rights in respect thereto and in respect to her contracts, and be liable on such contracts as if she were unmarried; but a husband and wife cannot contract to alter or dissolve the marriage or to relieve the husband from his liability to support his wife."

Also the following statute relative to the powers of insurance companies:

"New York Laws of 1897, Chapter 218, Section 16.—The cash capital of every domestic insurance corporation required to have a capital, to the extent of the minimum capital required by law, shall be invested and kept invested in the kinds of securities in which deposits with the Superintendent of insurance are required to be made. The residue of the capital and the surplus money and funds of every domestic insurance corporation over and above its capital, and the deposit that it may be required to make with the superintendent may be invested or loaned on the pledge of any of the securities in which deposits are required to be invested, or in the public stocks or bonds of any one of the United States, or except as herein provided, in the stocks, bonds and other evidence of indebtedness of any solvent corporation incorporated under the laws of the United States, or of any state thereof, or in such real estate of the United States, or of any state thereof, or in such real estate as it is authorized by this chapter to hold; no such funds shall be invested in or loaned on its stock or the stock of any other insurance corporation carrying on the same kind of insurance business.
21 Any domestic insurance corporation may, by direction and consent of two-thirds of its board of directors, managers or

finance committee, invest, by loan or otherwise, any such surplus money or funds in the bonds issued by any city, county, town, village or school district of this state, pursuant to any law of this state. Any corporation organized under the ninth subdivision of Section 70 of the Insurance Law for guaranteeing the validity and legality of bonds issued by any state, or by any city, county, town, village school district, municipality or other civil division of any state may invest, by loan or otherwise, any such surplus money or funds in the bonds which they are authorized to guarantee every such domestic corporation doing business in other states of the United States or in foreign countries, may invest the funds required to meet its obligations incurred in such other states or foreign countries, and in conformity to the laws thereof, in the same kind of securities in such other states or foreign countries that such corporation is by law allowed to invest in, in this state. Any life insurance Company may lend a sum not exceeding the lawful reserve which it holds upon any policy, on the pledge to it of such policy, and its accumulations as collateral security. But nothing in this section shall be held to authorize one insurance corporation to obtain by purchase or otherwise the control of any other insurance corporation."

Defendant further states that said loan agreement and the pledge of said policy thereunder were valid and legal under the laws of the State of New York, and that the action of the defendant in canceling said policy and applying its surrender value to the
22 payment of said loan was valid and legal under the laws of the State of New York, and that to deny to the defendant the benefit of said laws of the State of New York would be to refuse to give full faith and credit to the public acts, records and judicial proceedings of the State of New York, in violation of Section 1 of Article IV of the Constitution of the United States, and to deny to the defendant the equal protection of the laws, and to deprive the defendant of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Wherefore, having answered, defendant prays to be hence dismissed.

And for a second affirmative answer and defense, and without waiving the denial above pleaded, defendant states that on the 29th day of September, 1901, it issued its said policy of insurance numbered 1207072 upon the life of said Frederick W. V. Blees, which policy has been herewith filed and marked "Defendant's Exhibit A," and the said Frederick W. V. Blees paid the deposit or premium due on said policy for the years 1901, 1902, 1903 and 1904, which said payments carried said policy in force and effect up to the 29th day of September, 1905.

That on the 2nd day of March, 1904, said Frederick W. V. Blees assigned his interest in said policy to the pla-ntiff, and that thereafter, to wit, on or about the 12th day of October, 1904, said Frederick W. V. Blees and the plaintiff applied for and obtained a loan upon said policy in the total amount of nine thousand five hundred and fifty dollars ($9,550.00), as shown by said loan agreement herewith filed and marked "Defendant's Exhibit B."

23 Defendant states that the premium due on said policy on September 29th, 1905, was not paid, nor was said loan of $9,550.00, due September 29th, 1905, ever paid by said Frederick W. V. Blees, and that thereafter, to wit, on the 8th day of September, 1906, said Frederick W. V. Blees died without having paid the premium on said policy due September 29th, 1905, and without having repaid the said loan.

Defendant further states that the repayment of said loan was a condition of the insurance provided for in the policy and that the failure of said Frederick W. V. Blees to repay the same was a violation of said condition and that, therefore, there had been a violation of a condition of this insurance other than the non-payment of premiums at the time of the death of the said Frederick W. V. Blees, and that, therefore, the company is not bound to pay the amount of said policy under Section 6948 of the Revised Statutes of Missouri, 1909, but that, on the contrary, said policy had lapsed and the insurance had been canceled and the defendant is without liability thereunder.

Wherefore, having answered, defendant prays to be hence dismissed.

And for a third affirmative answer and defense, and without waiving the denial above pleaded, defendant states that on the 29th day of September, 1901, it issued its said policy of insurance numbered 1,207,072 upon the life of said Frederick W. V. Blees, which policy has been herewith filed and marked "Defendant's Exhibit A." And that said Frederick W. V. Blees paid the deposits or premiums due on said policy for the years 1901, 1902, 1903 and 1904, which said payments carried said policy in force and effect up to the

24 29th day of September, 1905. That on the 2nd day of March, 1904, said Frederick W. V. Blees assigned his interest in said policy to the plaintiff, then Mary S. Blees, his wife, and said assignment was acknowledged by the defendant. That thereafter, to wit, on or about the 12th day of October, 1904, said Frederick W. V. Blees and the plaintiff applied for and obtained a loan upon said policy in the total amount of $9,550.00, as shown by said loan agreement herewith filed and marked "Defendant's Exhibit B." That the proceeds of said loan were distributed as follows, to wit: To pay past due premiums on said policy to carry the same to the 29th day of September, 1905, four thousand two hundred ninety-one dollars and fifty cents ($4,291.50); to pay interest at five per cent (5%), adjusted also for interest on the premium, four hundred sixty-eight dollars ($468.00); balance by company's check, four thousand seven hundred ninety dollars and fifty cents ($4,790.50); total, nine thousand five hundred fifty dollars ($9,550.00).

Defendant states that the premium due on said policy on the 29th day of September, 1905, was not paid, nor was said loan of $9,550.00, due September 29th, 1905, ever paid, except by the application of the surrender value of said policy to the payment of said loan as aforesaid. That thereafter, to wit, on the 8th day of September, 1906, said Frederick W. V. Blees died without having paid the premium

on said policy due September 29th, 1905, and without having repaid said loan.

Defendant further states that Section 7897 of the Revised Statutes of Missouri, 1899, was amended by Act of the Legislature of
25 Missouri at its session in 1903, which said act is found in the Laws of 1903 at page 208. That by the terms of said amendment the defendant was entitled to deduct from three-fourths of the net value of said policy computed upon the actuaries or combined experience table of mortality at 4 per cent per annum, any notes or other evidence of indebtedness to the company, and that deducting from three-fourths of the net value of said policy so determined as of the 29th day of September, 1905, same being the day of lapse for default in payment of premiums on said policy, the said sum of $9,550.00, being the amount of said loan then on said policy, did not leave sufficient reserve, which, taken as a net single premium of temporary insurance for the full amount written in the policy, would carry said policy up to the date of the death of the insured.

Defendant further states that by the terms of said policy neither the insured nor the plaintiff were entitled to a loan on said policy until the same should have been in force and effect for three (3) full years, viz., on or after the 29th day of September, 1904.

Defendant further states that no right to extended insurance vested in said insured, or in the plaintiff, either under the terms of the policy or by statute, until after three annual premiums had been paid upon said policy; and that at the date said amendment to the statute took effect, to wit, on the 21st day of June, 1903, but two annual premiums had been paid on said policy. Defendant therefore states that Section 7897, Revised Statutes of Missouri, 1899, as amended by said Act of 1903, applies to and governs the policy in suit, and that the defendant is entitled to deduct from three-
26 fourths of the net value, calculated as above stated, the total amount of the indebtedness to the company on said policy at the date of lapse, and that to require the defendant to pay this policy will be to deny to the defendant the equal protection of the laws and to deprive the defendant of its property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and Section 30 of Article II of the Constitution of the State of Missouri.

Wherefore, having fully answered, defendant prays to be hence dismissed.

FORDYCE, HOLLIDAY & WHITE,
Attorneys for Defendant.

FREDERICK L. ALLEN,
MURRAY DOWNS,
Of Counsel.

Plaintiff's Reply to Defendant's Answer to Her Second Amended Petition.

Now comes Mary S. Liebing, the plaintiff in the above-entitled cause, and for her reply to defendant's answer filed to the plaintiff's

second amended petition herein, admits that defendant is a New York corporation engaged in the insurance business; admits that the defendant issued the policy in suit and that plaintiff is the assignee thereof; admits, too, that the insured and plaintiff applied for and secured the loan mentioned in its said answer, and that the same has never been repaid; admits also that the gross annual premium
27 due on the 29th day of September, 1905, was never paid, but plaintiff denies each and every allegation contained in said answer not hereinbefore admitted.

For further reply to said answer plaintiff states that at date of lapse (September 29th, 1905) four annual premiums had been paid on said policy, and at that time (September 29th, 1905) said policy had acquired a net value under the non-forfeiture laws of the State of Missouri, of eleven thousand two hundred and thirty dollars and eighty-three cents; that three-fourths thereof is eight thousand four hundred and twenty-three dollars and twelve cents; that deducting four thousand seven hundred and fifty-nine dollars and fifty cents therefrom (which is the aggregate amount applied to pay the premium due on the 29th day of September, 1904, and to pay interest on said loan and premium) leaves three thousand six hundred and sixty-three dollars and sixty-two cents, which sum, taken or applied as a net single premium as commanded by the non-forfeiture laws of Missouri in force when said policy was issued, carries said policy for the full amount written therein from date of lapse—September 29, 1905—for a period of four years, nine months and eighteen days, and the insured died eleven months, ten days from date of lapse, September 29th, 1905.

For further reply to defendant's said answer, plaintiff states that Frederick W. V. Blees, the insured, in the City of Macon, State of Missouri, made application to defendant for the policy in suit, and said policy was issued thereon and delivered by defendant to the insured in said city and state; that the premiums paid on
28 said policy were all paid to defendant in the State of Missouri, and hence said policy is a Missouri contract and governed by the laws thereof.

That the loan application and loan agreement, mentioned in defendant's answer, made by the insured and plaintiff, were so made by them in the City of Macon, Missouri; that so much of the proceeds of said loan as was paid to the insured or plaintiff, namely, the sum of $4,790.50, was so paid to them in the State of Missouri, and so much of said loan as was applied to pay the premium due September 29th, 1904, namely, the sum of $4,291.50, was thus applied in said state; that so much of said loan as was applied to pay interest, namely, the sum of $468.00, was thus applied in said state, and accordingly the application for said loan and the agreement therefor, and the entire transactions are Missouri contracts and governed by the laws thereof, and the laws of the State of New York are nowise involved and are wholly inapplicable in this case.

That neither the insured nor plaintiff had any correspondence or dealings whatever with defendant's so-called "home office" in New York; to the contrary, all correspondence and dealings were carried

on and transacted in Missouri, and not elsewhere; that the insured assigned said policy to the plaintiff in the State of Missouri, and not elsewhere.

That the loan agreement set forth in the defendant's answer and attempting to pledge the reserve or net value of said policy is void, because in conflict with Section 7897 of the Revised Statutes of the State of Missouri, 1899; that the alleged cancellation and settlement of the loan indebtedness, as well as the alleged appropriation of the reserve under said policy to repay said loan, as stated in defendant's said answer, are all illegal, void and of no force or effect, and the entire proceedings are contrary to and in conflict with the applicatory law, namely, the laws and statutes of the State of Missouri, in such cases made and provided.

That said loan agreement and alleged cancellation of said policy, together with the alleged appropriation of the policy reserve to repay said loan, were all adjudged illegal, null, void and of no force or effect by the Supreme Court of the State of Missouri, on the 20th day of December, 1916.

For further reply to defendant's said answer plaintiff states that on the 17th day of March, 1913, the defendant filed its primitive answer herein, and on the 17th day of April, 1913, defendant filed its amended answer, upon which latter answer said cause was tried in the Circuit and Supreme Courts; that defendant did not in either answer invoke the laws of New York as a defense herein, and did not lodge in either answer the constitutional question now attempted to be raised, namely, that to deny the defendant the benefit of the laws of the State of New York would be violative of the Federal Constitution; that by reason of the defendant's failure to timely invoke the New York laws and the Federal Constitution, the same have become belated questions and the right to invoke them, or either of them, as a defense herein has been waived, even if otherwise properly pleaded in the answer, which plaintiff denies.

That when defendant filed its first and second answers it knew the laws of the State of New York, that the said defendant omitted to invoke the same as a defense herein and thus induced the plaintiff to go to trouble and expense in litigating other matters relied upon as defenses herein, and by reason thereof the said defendant is estopped and precluded from setting up that the laws of the State of New York are applicable in this case, and estops and precludes the defendant from setting up that to deny defendant the benefit of the laws of the State of New York would violate the Federal Constitution; that those questions are dragged into the case too late, even if tenable, which plaintiff denies.

For further reply to defendant's said answer plaintiff states that the defense set forth in said answer and founded on the violation by the insured of a condition in said policy other than the non-payment of premiums has been fully adjudged against defendant by the Supreme Court of Missouri on the 20th day of December, 1916.

That the amendatory act of 1903 (Laws 1903, p. 208), referred to in defendant's answer, has been adjudged inapplicable in this case by the Supreme Court of Missouri on the 20th day of December, 1916.

Wherefore, plaintiff prays that all provisions of said policy, together with all stipulations in said loan agreement, as well as all of defendant's proceedings contrary to or in conflict with the statutes and decisions of the State of Missouri, be for naught held, and that plaintiff have judgment as in her petition prayed.

JAMES J. O'DONOHUE,
Attorney for Plaintiff.

The case was tried on the issues as above framed in the Circuit Court of the City of St. Louis before the Court and a jury on
31 April 30th, 1917, and at the close of the case the Court instructed the jury to return a verdict in favor of plaintiff on the policy, but left the question of damages and attorney's fees to the jury; and, thereupon, the jury returned a verdict in favor of plaintiff in the total amount of $92,069.28.

The defendant appealed to this court, which reversed and remanded the case, by decision of the Court in banc, rendered November 27, 1918.

See Liebing v. Mutual Life Ins. Co., 207 S. W. Rep., p. 230.

After the case was remanded, to wit, on the 14th day of February, 1919, the plaintiff filed an amended reply to the defendant's answer to the plaintiff's second amended petition, and on April 4th, 1919, plaintiff, by leave, amended said amended reply, and said amended reply (omitting caption and signatures) then read as follows:

Plaintiff's Amended Reply to Defendant's Answer to Her Second Amended Petition.

I.

Now comes Mary S. Liebing, plaintiff in the above-entitled cause, and, having first obtained leave of Court, files this her amended reply to defendant's answer filed to the plaintiff's second amended petition.

And, for said amended reply, plaintiff admits that defendant is a New York corporation, engaged in the insurance business; ad-
32 mits that the defendant issued the policy in suit, and that plaintiff is the assignee thereof; admits, too, that the insured and plaintiff applied for and secured the loan mentioned in defendant's said answer, and that the same has never been repaid; admits also that the gross annual premium due on the 29th day of September, 1905, was never paid; but plaintiff denies each and every allegation contained in said answer not hereinbefore admitted.

For further amended reply to said answer, plaintiff states that, at date of lapse (September 29th, 1905), four annual premiums had been paid on said policy, and at that time (September 29th, 1905) said policy had acquired a net value under the non-forfeiture laws of the State of Missouri of eleven thousand, two hundred and thirty dollars and eighty-three cents ($11,230.83); that three-fourths thereof is eight thousand, four hundred and twenty-three dollars

and twelve cents ($8,423.12); that deducting four thousand, seven hundred and fifty-nine dollars and fifty cents ($4,759.50) therefrom (which is the aggregate amount applied to pay the premium due on the 29th day of September, 1904, and to pay interest on said loan and premium) leaves three thousand, six hundred and sixty-three dollars and sixty-two cents ($3,663.62), which sum, taken or applied as a net single premium as commanded by the non-forfeiture laws of the State of Missouri in force when said policy was issued, namely, Section 7897, Revised Statutes of the State of Missouri, 1899, carries said policy for the full amount written therein from date of lapse—September 29th, 1905—for a period of four years, nine months and eighteen days, and the insured died in the City of St. Louis,
33 Missouri, on the 8th day of September, 1906, being eleven months and ten days from date of lapse; that is, from September 29th, 1905.

For further amended reply to defendant's said answer, plaintiff states that Frederick W. V. Blees, the insured, in the City of Macon, State of Missouri, made application to defendant for the policy in suit, and said policy was issued thereon and delivered to the insured by defendant's Macon, Missouri, office in said city and state; that delivery of said policy and payment of the first annual premium were conditions precedent to the completion of the contract of insurance; that all the premiums paid on said policy were paid to defendant's Macon, Missouri, office, and hence said policy is a Missouri contract and governed by the laws thereof; that the loan agreement, mentioned in defendant's said answer, was entered into by and between the insured, plaintiff and defendant in the City of Macon, Missouri; that so much of the proceeds of said loan as was paid to the insured or plaintiff, namely, the sum of four thousand, seven hundred and ninety dollars and fifty cents ($4,790.50), was so paid to and accepted by them by check and delivered to them by Dwight H. Payson of the defendant's Macon office in the State of Missouri; and so much of said loan as was applied to pay the premium due September 29th, 1904, namely, four thousand, two hundred and ninety-one dollars and fifty cents, was thus applied in Macon in said State of Missouri; that so much of said loan as was applied to pay interest, namely, four hundred and sixty-eight dollars, was thus applied in said state, and, accordingly, said loan agreement and all transactions concerning said loan occurred in the State of Missouri, and
34 hence said loan agreement and all transactions concerning the same are Missouri contracts and governed by the laws thereof, and the laws of the State of New York are not involved and are wholly inapplicable in this case. That neither the insured nor plaintiff herein had any correspondence or dealings whatever with the defendant's so-called Home Office in New York; to the contrary, all correspondence and dealings with respect to the policy and policy loan agreement were carried on and transacted in the State of Missouri and not elsewhere. That the pledge, assignment, transfer or setting over of the insured's or plaintiff's right, title and interest in and to the policy in suit, together with any moneys which might become payable under the same, were performed in the State of Mis-

souri and not elsewhere; and that said policy was delivered to said insured by Dwight H. Payson of defendant's Macon, Missouri, office in said city and state; that the loan agreement set forth in defendant's answer and attempting to pledge the reserve or net value of said policy is void, because in conflict with Section 7897 of the Revised Statutes of the State of Missouri, 1899; that the alleged cancellation and settlement of the loan indebtedness as well as the alleged appropriation of the reserve under said policy to repay said loan and cancellation of said policy, as stated in defendant's said answer, are all illegal, void and of no force or effect, and the entire proceedings are contrary to, and in conflict with, the applicatory law, namely, the laws of the State of Missouri in such cases made and provided.

For further amended reply to defendant's said answer, plaintiff states that the defendant, in its amended answer upon which this cause went to trial the first time, invoked, in its second affirma-
35 tive defense, Section 6948, Revised Statutes of Missouri, 1909, alleging therein that there was a condition of the policy violated other than that of non-payment of premium, and that, under that section, the defendant was not liable under the policy in suit; that defendant, in its said amended answer, invoked, too, in its third affirmative defense, the Missouri Amendatory Act of 1903 (Laws of Missouri, 1903, page 208), and it based its fourth affirmative defense there on Section 7899, Revised Statutes of Missouri, 1899, requiring (as it alleged) notice to be given and proofs of death to be made ninety days after the death of Frederick W. V. Blees, the insured; and its fifth affirmative defense was founded upon the five years' statute of limitations of the State of Missouri.

That issues were joined on said amended answer, and the cause was tried under the laws of the State of Missouri on the 16th day of May, 1913, and the plaintiff suffered an involuntary nonsuit, and her petition was then and there dismissed, which appears from the following, which is a correct copy of the judgment of the trial court (caption omitted), namely:

"Now, at this day, come the parties as aforesaid, and come, also, the jurors sworn and impaneled herein; thereupon, the trial of this cause is resumed, and progressed, and, at the close of the plaintiff's case, the Court, at the request of defendant, gave to the jury the following instruction, to wit:

'The Court instructs the jury that, under the pleadings and the evidence offered for the plaintiff, their verdict must be in favor of defendant.'

36 "Wherefore, owing to the adverse rulings of the Court, the plaintiff says she will not further prosecute her suit in this behalf, but, with leave to move to set the same aside, will take a nonsuit. It is now, therefore, ordered and adjudged by the Court, that the plaintiff's cause of action herein, be, and the same is hereby, dismissed at the costs of said plaintiff and Sarah J. Clauss, the surety on the cost bond herein, for which let execution issue. Instruction filed."

That the plaintiff appealed from said judgment and the cause was reversed and remanded on the 20th day of December, 1916, by the Supreme Court of the State of Missouri, and the decision therein is reported 269 Mo. 509. That, in said decision, the Supreme Court of Missouri adjudged, among other things, that the non-forfeiture statutes were applicable and "disposed of the whole matter," and that the Missouri Amendatory Act of 1903 (Laws of Missouri 1903, page 208) was inapplicable in this case; adjudged, furthermore, that:

"The issuance of the policy, the payment of four annual premiums, the death of the insured, and the assignment of the policy to appellant having been admitted by the answer, and there having been evidence tending to prove Blees died during the period the net value of the policy extended the insurance, and that proof of death was waived, this was not a case the Court should have taken from the jury."

That, on said date, December 20th, 1916, the Supreme Court of the State of Missouri sent down to the trial court its mandate, of which the material parts read:

37 "Now, at this day, come the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the said cause be remanded to the said court, to set aside its order overruling the motion, to set aside the nonsuit herein, and to sustain said motion, and to proceed with the cause in a manner not out of accord with the opinion of the Court herein delivered; and that the said appellant recover against the said respondent her costs and charges herein expended, and have execution therefor (opinion filed)."

That, by reason of the said decision and mandate above referred to, the said loan agreement and alleged cancellation of said policy, together with the alleged appropriation of the policy reserve to pay said loan, were all adjudged illegal, null, void, and of no force or effect by the Supreme Court of the State of Missouri, on the date aforesaid, namely, on the 20th day of December, 1916.

For further amended reply to defendant's said answer, plaintiff states that on the 17th day of March, 1913, the defendant filed its first answer herein, and, on the 17th day of April, 1913, defendant filed its amended answer, upon which amended answer said cause was tried in the Circuit Court and Supreme Court, as aforesaid; that defendant did not, in either answer, invoke the laws of the State of New York as a defense herein, and did not, in either answer, lodge the constitutional question now attempted to be raised in the present answer, namely: That to deny to defendant the benefit of the laws of the State of New York would be violative of the Federal Consti-
38 tution; that, by reason of the defendant's failure to timely invoke the New York laws and Federal Constitution, the same have become belated questions, and the right to invoke them, or

either of them, in the present answer, as a defense herein, has been waived, even if otherwise sufficiently pleaded in said answer, which plaintiff denies; that, when defendant filed its first and second answers herein, it knew the laws of the State of New York; that the said defendant did not invoke the same as a defense herein until after the cause came down from the Supreme Court for re-trial, and thus induced the plaintiff to go to trouble and expense in litigating other matters relied upon as defenses herein, and by reason thereof, the said defendant is estopped and precluded from setting up that the laws of the State of New York are applicable in this case, and is estopped and precluded from setting up that to deny the defendant the benefit of the laws of the State of New York would violate the Federal Constitution; that those questions are dragged into the case too late, even if tenable, which plaintiff denies; that the plaintiff's original petition contained all the allegations material to the present action, which are contained in her second amended petition herein; that the New York laws invoked in the defendant's present answer herein might have been litigated on the first trial herein; and the defendant ought not now to be permitted to assert that the New York laws are applicable; that before the institution of this action defendant put non-liability on the ground that there was no decision of the Supreme Court of Missouri conclusively deciding the points arising in said case, thereby waiving the
39 right (if it existed) to invoke any other defense herein.

II.

For further amended reply to defendant's said answer, plaintiff states that the policy and policy loan agreement in this case are Missouri contracts, and, being such, Section 7897, Revised Statutes of Missouri 1899, which, in part, provides:

"That in the event of non-payment of premium after the payment of three annual premiums the net value of the policy when the premium becomes due and is not paid shall be computed upon the actuaries' or combined experience table of mortality with 4 per cent interest per annum and after deducting from three-fourths of said net value any notes or other evidence of indebtedness to the company given on account of past premium payments on said policies issued to the insured, which indebtedness shall be then canceled, the balance shall be taken as a net single premium for temporary insurance for the full amount written in the policy,"

together with the cases of Cravens v. New York Life, 148 Mo. 583, affirmed 178 U. S. 389; Horton v. New York Life, 151 Mo. 604 and Smith v. Mutual Benefit Life, 173 Mo. 329, construing said section, entered into and became constituent elements of the policy and loan contracts between the parties, constituting a part of the consideration for entering into said contracts; and in contemplation of law, it is the same as if the section and decisions aforesaid had been written into the face of said policy and loan contracts.

Plaintiff further states that said policy loan and contracts were not New York transactions, but were contracts of the State of Missouri, and said contracts were in all respects in accordance with the laws of said State of Missouri.

Plaintiff further states that at the time said policy was issued, prior thereto and continuously ever since, she was and now is a citizen of the United States and a resident and citizen of the State of Missouri; and that Frederick W. V. Blees, the insured, was at the time said policy was issued and continuously up to his decease, a citizen of the United States, and a resident and citizen of the State of Missouri; that failing to apply said section and decisions above referred to, or failing to give the benefits thereof to the plaintiff herein would fail to give full faith and credit to the acts and transactions lawfully done in the State of Missouri, and would, therefore, be contrary to and in violation of Section 1 of Article IV of the Constitution of the United States; and would abridge the privileges and immunities of this plaintiff as a citizen of the United States and State of Missouri, contrary to and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and of Section 2 of Article IV of the Constitution of the United States and of Section 4 of Article II of the Constitution of the State of Missouri; and would deprive the parties to said contracts of their liberty of contract in the State of Missouri, and would deprive plaintiff of her property without due process of law contrary to and in violation of Article V and of Section 1 of Article XIV of the Amendments to the Constitution of the United States, and contrary to and in violation of Section 30 of Article II of the Constitution of the State of Missouri, and would impair the obligation of said contract of insurance and policy loan agreement duly made between said parties in the State of Missouri by change of decision, and would, therefore, be contrary to and in violation of Section 10 of Article I of the Constitution of the United States, and would be contrary to and in violation of Sections 4 and 15 of Article II of the Constitution of the State of Missouri, and would deprive the plaintiff of the equal protection of the laws of the State of Missouri, contrary to and in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States and Section 10 of Article I of the Constitution of the United States, and would fail to give full faith and credit to the statutes and decisions of the State of Missouri, contrary to and in violation of Section 1 of Article IV of the Constitution of the United States and Section 10 of Article II of the Constitution of the State of Missouri.

For further amended reply to defendant's said answer, plaintiff states that the common, unwritten and statutory laws of the State of New York, including Section 21 of Chapter 272 of the New York Laws of 1896 and Section 16 of Chapter 218 of the New York Laws of 1897, and all laws of the State of New York referred to or set forth in defendant's said answer are unconstitutional and void, and to allow them as a defense herein or to apply them in this case would fail to give full faith and credit to the acts and transactions lawfully done in the State of Missouri, and would, therefore, be contrary to

and in violation of Section 1 of Article IV of the Constitution of the United States; and would abridge the privileges and immuni-
42 ties of this plaintiff as a citizen of the United States and State of Missouri, contrary to and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and Section 2 of Article IV of the Constitution of the United States, and of Section 4 of Article II of the Constitution of the State of Missouri; and would deprive the parties to said contracts of their liberty of contract in the State of Missouri, and would deprive plaintiff of her property without due process of law, contrary to and in violation of Article V and of Section 1 of Article XIV of the Amendments to the Constitution of the United States, and contrary to and in violation of Section 30 of Article II of the Constitution of the State of Missouri, and would impair the obligation of said contract of insurance and policy loan agreement duly made between said parties in the State of Missouri by change of decision, and would, therefore, be contrary to and in violation of Section 10 of Article I of the Constitution of the United States, and would be contrary to and in violation of Sections 4 and 15 of Article II of the Constitution of the State of Missouri, and would deprive the plaintiff of the equal protection of the laws of the State of Missouri, contrary to and in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States, and Section 10 of Article I of the Constitution of the United States, and would fail to give full faith and credit to the statutes and decisions of the State of Missouri, contrary to and in violation of Section 1 of Article IV of the Constitution of the United States and Section 10 of Article II of the Constitution of the State of Missouri.

43 III.

For further amended reply to defendant's answer, plaintiff states that neither the application for said policy, nor a copy thereof, nor the rules of said defendant, nor a copy thereof, nor the loan agreement, nor a copy thereof, were either attached to, endorsed on, set forth in, referred to, or made a part of said policy in any manner whatsoever; and, by reason thereof, neither the application, nor the rules of defendant, nor the loan agreement, form part of said policy, nor have any influence on this proceeding under the laws of the State of Missouri in force when said policy was issued, and in force ever since.

For further amended reply to defendant's said answer, plaintiff states that, if the laws of the State of New York, referred to in said answer, are applicable, were timely enough invoked and are sufficiently pleaded in said answer (all of which plaintiff denies), then plaintiff states that it was, at the time application was made for said policy, and when said policy was issued, and has ever since been, the statutory, common and unwritten law of the State of New York, that no application for a policy of insurance, and no rules of the insurer, and no policy loan agreement, or other instrument or paper writing, becomes a part of a contract of insurance, unless the same is either

attached to said policy or indorsed thereon, or set forth therein; that the laws of the State of New York aforesaid, have been construed and embodied in the following decisions of the higher courts of said State of New York, namely: The Farmers' Insurance and Loan Company v. Snyder, 16 Wend. (N. Y.) 481; Vilas v. New York Cent. Ins. Co., 72 N. Y. 590; Fitzgerald v. Supreme Council, 39 App. Div.
44 (N. Y.) 251, affirmed without opinion in 167 N. Y. 568; Richards v. King, 57 Misc. (N. Y.) 177; Fletcher v. Bankers Life Ins. Co., 62 Misc. (N. Y.) 546, and Cole v. Knickerbocker Life Ins. Co., 63 How. Pr. Rep. (N. Y.) 442. All of which law and decisions, as well as all analogous and identical ones of said State, plaintiff asks to be made a part hereof, as if copied in full herein.

Plaintiff further states that neither the application for said policy, nor copy thereof, nor the rules of said defendant, nor copy thereof, nor the loan agreement, nor copy thereof, were either attached to, endorsed on, set forth in, referred to, or made a part of said policy, in any manner whatsoever, and by reason thereof, under the laws of the State of New York, above referred to, neither formed a part of said policy and said loan agreement, is now void and of no force or effect, and the alleged appropriation of the cash surrender value of said policy and cancellation thereof, to repay said loan, were all, under the New York laws, illegal, null, void, and of no force or effect whatsoever.

IV.

For further amended reply to defendant's said answer, plaintiff states that, by the terms of said policy, it was agreed that, upon the payment of four annual premiums, defendant would loan the sum of nine thousand, five hundred and fifty dollars, and that the same should be repaid in any settlement of said policy.

Plaintiff further states that the additional and more onerous provisions incorporated in said loan agreement which stipulate
45 for the cancellation of the policy and the appropriation of the cash surrender consideration to the payment of said loan, is void and of no binding effect because the same enlarges on the policy, conflicts therewith, and is without any consideration whatsoever.

For further amended reply to defendant's said answer, plaintiff states that if the loan agreement is a contract of the State of New York (which plaintiff denies), then plaintiff states that it was at the time Frederick W. V. Blees made application for said policy, and has ever since been, the law of said State of New York that agreements concerning policy values, including loan agreements, are not contracts independent of the policy, but are entirely subject to and controlled by said policy, and by the laws under which said policy is made; that said law of the State of New York above referred to has been construed, approved and is embodied in the following cases, namely: Mutual Life agt. Terry, 62 How. Pr. Rep. (N. Y.) 325; Cole v. Knickerbocker Life Ins. Co., 63 How. Pr. Rep. (N. Y.) 442; Garner v. Germania Life, 110 N. Y. 266; Barry v. Brune et al., 71 N. Y. 261. All of which law and decisions, as well as all identical

and analogous decisions of said State, plaintiff asks to be made a part hereof as if copied in full herein.

Plaintiff further states that the policy in suit is a contract of the State of Missouri, governed and controlled by the laws thereof, and that said loan agreement, even if made in the State of New York (which plaintiff denies), yet the same is subject to and governed by said policy and the laws of the State of Missouri.

46

VI.

For further amended reply to defendant's said answer, plaintiff states that said policy contains the following incontestability stipulation, namely, "Incontestability.—After two years from date of issue this contract shall be incontestable if the deposits shall have been duly made".

Plaintiff further states that Frederick W. V. Blees, the insured, died more than two years from the date said policy was issued, and at the time of his decease, deposits had been duly made, which were sufficient, under the laws of both the States of Missouri and New York, to pay premiums on said policy and keep it alive for a period long beyond the decease of the insured.

Plaintiff further states that by virtue of the incontestability stipulation above quoted, the alleged appropriation of the so-called customary cash surrender consideration to repay said loan is void and of no binding effect.

Plaintiff further states that said incontestability stipulation shuts off the defenses in said answer founded upon the non-payment of said loan and precludes and bars the defendant from setting up the same as a defense herein.

VII.

For further amended reply to defendant's said answer, plaintiff states that it was at the time Frederick W. V. Blees made application for said policy, and has ever since been, the law of the State of New York that pledgees have no power to apply the articles pledged to repay loans, but are bound under said law to sell the articles

47 thus pledged and repay said loans in cash, and in cash alone; that said law is construed and embodied in the case of Field v. Sibley, 74 App. Div. (N. Y.) 81, affirmed in 174 N. Y. 514, and in the cases there referred to and cited; and by reason thereof, if said policy loan agreement referred to and quoted from in defendant's said answer is a New York contract (which plaintiff denies), then the same is void and of no binding effect and the alleged appropriation of the so-called customary cash consideration and cancellation of said policy are also void and of no binding effect. All of which law and decisions, as well as all identical and analogous decisions of said State, plaintiff asks to be made a part hereof as if copied in full herein.

VIII.

For further amended reply to defendant's said answer, plaintiff states that Chapter 246 of the Laws of the State of New York, 1842, pages 301 to 305, inclusive, as well as Chapter 60 of the Laws of the State of New York, 1851, page 69, together with Chapter 131 of the Laws of the State of New York, 1862, page 287, were, at the time application was made by Frederick W. V. Blees for said policy, and continuously up to his decease, in full force and effect and binding on defendant, and during said time, the same constituted the entire charter of said defendant; that Sections 9, 10 and 11 of Chapter 246 of the Laws of the State of New York, 1842, in force and binding on defendant and forming part of its charter at the
48 time Frederick W. V. Blees made application for said policy, and continuously up to his decease, as aforesaid, read:

"9. It shall be unlawful for said corporation to invest the said premiums in the securities designated in the two following sections, and to sell transfer and change the same and re-invest the funds of said corporation when the trustees shall deem expedient."

"10. The whole of the premiums received for insurance by said corporation, except as provided for in the following sections shall be be invested in bonds and mortgages on unencumbered real estate within the State of New York, the real property to secure such investments of capital shall, in every case be worth twice the amount loaned thereon."

"11. The trustees shall have power to invest a certain portion of the premiums received, not to exceed one-half thereof in public stocks of the United States, or of this State or of any incorporated city in this State."

Plaintiff further states that the defendant is not now and never was a stock company, but has during its existence conducted its business on the mutual plan; that under the statutory, common and unwritten law of the State of New York, as construed and announced in the following cases; namely, The North River Ins. Co. v. Lawrence, 3 Wend (N. Y.) 482; The Life and Fire Ins. Co. v. The Mechanics Fire Ins. Co., 7 Wend. (N. Y.) 31; New York Firemen's Ins. Co. v. Ely, 2 Cow. (N. Y. 678; Pratt et al. v. Short et al. 79 (N. Y.) 437, and in force at the time Frederick W. V. Blees made application for said policy, and in force ever since, prohibited corporations
49 from making loans or taking as security therefor any property, unless such as are expressly granted and named in their charters. All of which law and decisions, as well as all identical and analogous decisions of said State, plaintiff asks to be made a part hereof as if copied herein.

Plaintiff further states that said defendant, neither under its charter nor under the laws of the State of New York in force at the time Frederick W. V. Blees made application for said policy, and in force ever since, had power or authority to make either said loan or enter into said policy loan agreement herein; and had no power or au-

thority to appropriate the so-called customary cash consideration of said policy, or cancel the same to repay said loan; that said loan and loan agreement, together with the alleged appropriation of the so-called customary cash consideration and cancellation of said policy, are acts none of which are within the scope of defendant's charter; that they are ultra vires, void and have no binding force or effect.

IX.

For further amended reply to defendant's said answer, plaintiff states that it was, at the time Frederick W. V. Blees made application for said policy, and has ever since been, the statutory, common and unwritten law of the State of New York that a contract agreeing in case of default in the payment of the loan the insurer might, without notice or demand, cancel the policy and apply the cash surrender value thereof to payment of the loan, is null and void, because operating as an enforced conversion of the policy; and further, be-
50 cause repugnant to the right of redemption; that said law is construed and embodied in the cases of Mooney v. Byrne, 163 N. Y. 86 and Reich v. Cochran, 84 Misc. (N. Y.) 247. That under the laws of the State of New York in force as aforesaid, the loan and loan agreement herein, and alleged appropriation of the so-called customary cash consideration of said policy, as well as the alleged cancellation of said policy, are all null, void and of no binding effect. All of which law and decisions as well as all identical and analogous decisions of said state plaintiff asks to be made a part hereof as if copied in full herein.

X.

For further amended reply to defendant's said answer, plaintiff states that on the 29th day of September, 1905, Frederick W. V. Blees was then suffering from a fatal disease from which he subsequently died and had ceased to be an insurable risk.

Plaintiff further states that it was at the time Frederick W. V. Blees made application for said policy, and has ever since been, the statutory, unwritten and common law of the State of New York, that, in the event of the lapse of a policy for non-payment of premium, the cash value thereof is not its true value, and that all sums in the insurer's hands belonging to the insured or beneficiary must be applied to keep the policy alive. That said law is construed and announced in Hazel v. Golden Eagle Ass'n, 161 N. Y. Supp. 91; Bailey v. American Deposit Co., 52 App. Div. (N. Y.) 402, affirmed 165 N. Y. 672; Toplitz v. Bauer, 161 N. Y. 325. All of which law and decisions as well as all identical and analogous decisions of said State. plaintiff asks to be made a part hereof as if copied in full herein.

Plaintiff further states that she is informed and believes
51 and states the fact to be that at date of lapse, under the laws of the State of New York in force as aforesaid, the distributive share of surplus under said policy was more than four thousand two hundred and ninety-one dollars and fifty cents, any-ing in the policy to the contrary notwithstanding, the same being more than sufficient

to pay the annual premium due on said policy on the 29th day of September, 1905.

Plaintiff further states that said policy lapsed on the 29th day of September, 1905, and Frederick W. V. Blees, the insured, died on the 8th day of September, 1906; that is, he died 11 months and 10 days from date of lapse.

Plaintiff further states that the sum of $715.79, taken as a net single premium for temporary insurance for the full amount written in said policy; namely, $65,250.00, calculated on the Actuaries' or Combined Experienced Table of Mortality with four per cent interest per annum at the attained age of 45 would carry said policy for 11 months and 10 days. That calculated on the American Experience Table of Mortality with four and one-half per cent interest per annum, the sum of $651.04 would carry said policy the same length of time. That calculated on the American Experience Table of Mortality, with three and one-half per cent interest per annum, the sum of $657.72 would carry said policy the same length of time. And calculated on the American Experience Table of Mortality, with three per cent interest per annum, the sum of $660.83 would carry said policy the same length of time; and, under the laws of the State of New York, said policy was in force and effect at the time the insured died.

52 XI.

For further amended reply to defendant's said answer, plaintiff states that it was at the time Frederick W. V. Blees made application for the policy in suit, and has ever since been, the statutory, common and unwritten law of the State of New York that where the wife is the assignee of or designated beneficiary in a policy of insurance on the life of her husband, neither he nor she nor both together can assign, pledge or transfer said policy for any purpose whatsoever, especially where the wife has children and has not the written consent of her husband to such assignment, pledge or transfer, and that, too, in spite of the laws pleaded in said answer. That the common unwritten and statutory law of the State of New York aforesaid, have been construed, interpreted and are embodied in the following New York cases (and in the cases there cited), namely: Eadie v. Slimmon, 26 N. Y. 9; Barry v. Equitable Life, 59 N. Y. 587, affirming 14 Abb. Prac. N. S. 385; Barry v. Brune, 71 N. Y. 261, affirming 8 Hun. 395; Wilson v. Lawrence, 76 N. Y. 585; Baron v. Brummer, 100 N. Y. 72; Frank v. Mutual Life, 102 N. Y. 266, affirming 12 Daly 267; Brick v. Campbell, 122 N. Y. 337, reversing 55 N. Y. Super. Ct. 569; Barry v. Mutual Life, 49 How. Prac. (N. Y.) 504; Mutual Life Ins. Co. v. Terry, 62 How. Prac. (N. Y.) 325; Milhous v. Johnson, 4 N. Y. Supp. 199; Dudley v. Fifth Avenue Trust Co., 115 App. Div. (N. Y.) 396; Grems v. Traver, 87 Misc. (N. Y.) 644; Brummer v. Cohen, 86 N. Y. 11; Bradshaw v. Mutual Life, 205 N. Y. 467.

53 All of which law and decisions, as well as all identical and analogous decisions of said State, plaintiff asks to be made a part hereof as if copied in full herein.

Plaintiff further states that Frederick W. V. Blees was her husband, had been such at the time he made application for said policy and up to his decease; that plaintiff did not have his written consent to sign or execute said loan agreement, nor to assign, pledge or transfer said policy as security for said loan; that at the time said loan agreement was made and entered into and when said policy was assigned, pledged and transferred to defendant, plaintiff had minor and adult children then living, and, under the laws of the State of New York then in force, said loan agreement, as well as the alleged assignment, pledge and transfer of said policy as security for said loan, were acts all of which were null, void and of no binding effect.

XII.

For further amended reply to defendant's answer, plaintiff states that Sections 1, 2 and 5 of Title III of Part II of Chapter IV of Volume IV (Eighth Edition), page 2512 of the Revised Statutes of the State of New York 1889, read:

"Section 1. The rate of interest upon the loan or forbearance of any money, goods, or thing in action shall be six dollars upon one hundred dollars, for one year, and at that rate for a greater or less sum, or for a longer or shorter time."

"Section 2. No person or corporation shall directly or indirectly, take or receive in money, goods or things in action, or in any other way, any greater sum or greater value for the loan or forbearance of any money, goods or thing in action, than is above described."

54 "Section 5. All bonds, bills, notes, assurances, conveyances, all other contracts or securities whatsoever (except bottomry and respondentia bonds and contracts), and all deposits of goods or other things whatsoever, whereupon or whereby there shall be reserved or taken, or secured or agreed to be reserved or taken, any greater sum, or greater value, for the loan or forbearance of any money, goods or other things in action, than is above prescribed, shall be void."

Plaintiff states that said sections of the statutes of the State of New York hereinbefore set out have been at all times herein mentioned (including the time said loan agreement was made), and now are in full force and effect in the State of New York, and that the same have not been repealed nor modified by any subsequent enactment of said State. That said sections are now known as sections 370, 371 and 373 of Volume II, Consolidated Laws of the State of New York, pages 1888-1891.

Plaintiff further states that at date of lapse, namely, on the 29th day of September, 1905, calculated on the actuaries' or combined experience table of mortality with interest at the rate of 4 per cent per annum, said policy had a net value of $11,230.43; that calculated at said date on the American Experience Table of Mortality with interest at the rate of four and one-half per cent per annum, said policy

had a net value of $9,881.46; that calculated at said date of lapse on the American Experience Table of Mortality with interest at the rate of three and one-half per cent per annum, said policy had a net value of $11,947.93; that calculated at said date on the American Experience Table of Mortality with interest at the rate of three
55 per cent per annum, said policy had a net value of $13,-191.59.

Plaintiff further states that at the time said policy was issued the defendant was doing business according to the American Experience Table of Mortality with interest at the rate of three and one-half per cent per annum; that defendant fixed the gross premiums of said policy pursuant to said table and calculated thereby the reserve under said policy; that the gross premiums thus fixed and calculated were sufficient to meet administrative and other expenses as well as pay mortality claims and to leave also to the credit of said policy, at date of lapse, the sum of $11,947.93, which sum, less loan and interest, was, at date of lapse, in the hands of defendant and belonged to the insured and plaintiff herein.

That said sum of $11,947.93 in the hands of defendant and belonging to the insured and plaintiff herein as aforesaid, is in excess of the loan of $9,550.00, in the sum of $2,397.93, which, when added to the surplus under said policy at date of lapse of more than $4,291.50, makes the sum of more than $6,689.43, and this sum added to the sum of five per cent per annum charged by defendant as interest on said loan makes a sum in excess of six per cent interest per annum on said loan.

That the loan agreement mentioned in said answer is neither bottomry or respondentia bonds, and it was made and delivered to defendant upon the corrupt and usurious agreement between the defendant, the insured and plaintiff, that the defendant should reserve and secure to itself, for the loan of $9,550.00, for one year an article, namely, said policy, which had a greater value than said loan
56 of $9,550.00, and interest thereon at the rate of six per cent per annum.

That, if said loan agreement and pledge of said policy are contracts of the State of New York (which plaintiff denies), then said loan agreement and pledge are void because repugnant to and conflicting with the interest statutes of the State of New York above quoted.

XIII.

For further amended reply to defendant's said answer, plaintiff states that, upon the payment of the fourth annual premium, there was guaranteed in the table of values in said policy paid-up insurance per thousand in the sum of $522.00, which, calculated at age 45 on the American Experience Table of Mortality, with three per cent interest per annum, was of the cash value of $263.40, or the sum of $72.40 more than the cash surrender value of $191.00 per thousand.

That, under said table and rate of interest, the cash value of the paid-up insurance guaranteed by said policy was not less than $13,-

170.00, and was not less than $3,620.00 in excess of said loan and cash surrender value of said policy.

That, calculated at age 45, on the American Experience Table of Mortality, with three and one-half per cent interest per annum, said paid up insurance of $522.00 was of the cash value of $238.03, or the sum of $47.03 greater than the cash surrender value of $191.00 per thousand.

That, under said table and rate of interest, the cash value of the paid-up insurance guaranteed by said policy was not less than $11,901.50, and was not less than $2,351.50 in excess of said loan and cash surrender value of said policy.

57 That, calculated at age 45, on the Actuaries' or Combined Experience Table of Mortality, with interest at the rate of four per cent per annum, said paid-up insurance of $522.00 was of the cash value of $223.71, or the sum of $32.17 greater than the cash surrender value of $191.00 per thousand.

That, under said table and rate of interest, the cash value of the paid-up insurance guaranteed by said policy was not less than $11,185.50, and not less than $1,635.50 in excess of said loan and cash surrender value of said policy; that said sum of $1,635.50, taken as a net single premium at the attained age of 45 years, under any table and rate of interest above referred to, was sufficient to purchase temporary insurance for the full amount of said policy, namely, $65,250.00, from date of lapse, namely, the 29th day of September, 1905, until after the death of the insured, which sum the defendant should have thus applied.

Plaintiff further states that, since said policy had a paid-up cash value in excess of said loan, the loan agreement and alleged cancellation of said policy are null, void and of no binding effect.

XIV.

For further amended reply to defendant's said answer, plaintiff states that, out of said loan of $9,550.00, Frederick W. V. Blees received the sum of $4,790.50, and plaintiff received no sum whatsoever.

That, calculated on the American Experience Table of Mortality, 44 years, on the Actuaries' or Combined Experience Table of Mortality, with interest at the rate of four per cent per annum, said policy had acquired a reserve value of $8,239.77, being

58 $3,449.27, in excess of the amount Blees, the insured, received out of said loan.

That, calculated on the American Experience Table of oMrtality, with interest at the rate of four and one-half per cent per annum, said policy had acquired a reserve value of $7,229.70, being $2,439.20 in excess of the amount Blees, the insured, received out of said loan.

That, calculated on the American Experience Table of Mortality, with interest at the rate of three and one-half per cent per annum, said policy had acquired a reserve value of $8,781.35, being $3,990.85 in excess of the amount Blees, the insured, received out of said loan.

Plaintiff further states that, calculated under the tables (or any of them) above referred to, said policy had, upon payment of the third annual premium, acquired a reserve value in excess of the sum received by Blees, the insured, out of said loan, more than sufficient when applied as a net single premium for term insurance to carry said policy for the full amount written therein, namely, $62,250.00, for a period of more than one year, eleven months and ten days, being the length of time from the end of the third policy year to the day the insured died, and that the said defendant should have thus applied said excess, and thereby avoided the alleged forfeiture of said policy.

XV.

For further amended reply to defendant's said answer, plaintiff states that, under the law of the State of New York announced, construed and determined by the Court of Appeals and Supreme
59 Courts of said State upon contracts and facts identical with the loan agreement here; and upon contracts and facts analogous to the contract and facts of this case, it has been determined by said New York courts that in mortgage, assignment and pledge contracts, where a day is fixed for forfeiture or foreclosure without demand or notice to the mortgagor, assignor or pledgor (as the case may be) for nonpayment of the debt for the security of which said mortgage, assignment or pledge is made, the mortgagee, assignee or pledgee (as the case may be) must forfeit and foreclose on the exact day fixed, and in the event of his failure to forfeit and foreclose on the exact day named the same operates as a waiver of the right (if it existed) to forfeit or foreclose without notice or demand to the mortgagor, assignor or pledgor as the case may be; that forfeiture or foreclosure on a later day without demand and notice to the borrower is null, void and of no binding effect under the decisions of said Court of Appeals and Supreme Court of the State of New York, and a few of said decisions so holding are the following: Stevens v. Mutual Life Insurance Co., 183 App. Div. (N. Y.) 629, 171 N. Y. Supp. 296; Franklin National Bank v. Newcombe, 1 App. Div. 295; affirmed 157 N. Y. 699; Bailey v. American D. and L. Co., 52 App. Div. 402; affirmed, 165 N. Y. 672; Gillett v. Bank of America, 160 N. Y. 560; Wyckoff, Church & Partridge v. Riverside Bank, 135 App. Div. (N. Y.) 400; Toplitz v. Bauer, 161 N. Y. 325; Lindenthal v. Germania Life Ins. Co., 174 N. Y. 76; Arnot v. Union Salt Co., 186 N. Y. 501, 511; Small v. Housman, 208 N. Y. 124; Morris v. Windsor Trust Co., 213 N. Y. 27; Schoenberg v. Mutual
60 Profit Realty Co., 94 Misc. Rep. (N. Y.) 203; Schulder v. Ladew Co., 178 App. Div. (N. Y.) 458. All of which decisions are specially referred to and asked to be made part hereof as if copied in full herein.

Plaintiff further says that there are various other cases of the Court of Appeals and Supreme Court of said State announcing the doctrine of said cases particularly referred to and plaintiff pleads the laws of the State of New York as determined by the Court of Appeals and Supreme Court of said State as showing the invalidity of the alleged

appropriation of the customary cash consideration of said policy, together with the invalidity of alleged forfeiture, foreclosure and cancellation of said policy by defendant herein.

Plaintiff further states that the time fixed by the loan agreement herein, for the payment of said loan, as well as for the appropriation of the customary cash consideration, the foreclosure and cancellation of said policy to repay said loan, was the 29th day of September, 1905; that defendant did not on said date, nor earlier than the 15th day of November, 1905, either forfeit, foreclose or cancel said policy or apply the customary cash consideration thereof to repay said loan, thereby waiving the right (if it existed) to appropriate the customary cash consideration of said policy to repay said loan without demand or notice to the insured or plaintiff; and thereby also waiving the right (if it existed) to either forfeit, foreclose or cancel said policy without demand or notice to the insured or plaintiff; that neither the insured nor plaintiff herein had any notice of the time when nor the place where the defendant intended to apply the customary cash consideration of said policy to repay said loan, nor had either of them any notice of the time when or the place
61 where the defendant intended to foreclose, forfeit or cancel said policy; that no demand of said loan was ever made on either the insured or plainiff herein, nor had either of them any notice of the time when the fifth annual premium was due on said policy, though it was the custom of said defendant to give such notice.

Plaintiff further states that the law of the State of New York aforesaid, was in force in said State at the time Frederick W. V. Blees made application for said policy and has been in force ever since, and under said law the alleged appropriation of the customary cash consideration, as well as the alleged foreclosure, forfeiture and cancellation of said policy to repay said loan are all null, void and of no binding effect.

XVI.

Finally, plaintiff denies that said loan agreement is a contract of the State of New York and denies that the laws of said State are either applicable or controlling, and she avers that said loan agreement is a contract of the State of Missouri, governed and controlled by the laws thereof.

And plaintiff again prays judgment as in her petition prayed.

JAMES J. O'DONOHOE,
Attorney for Plaintiff.

Received copy February 14, 1919.

FORDYCE, HOLLIDAY & WHITE,
Attorneys for Defendant.

62 On April 10th, 1919, the defendant filed a motion to strike out parts of plaintiff's amended reply to defendant's answer to plaintiff's second amended petition, which motion (caption omitted) reads as follows:

Motion to Strike.

Now at this day comes defendant, and leave of Court having been obtained, files this its motion to strike out parts of the plaintiff's amended reply to defendant's answer to plaintiff's second amended petition.

And defendant moves the Court to strike from said amended reply the following parts thereof, for the following reasons, to wit:

First. Commencing at the beginning of the third paragraph at the bottom of the first page of said amended reply with the words:

"For further amended reply to said answer, plaintiff states that at the date of lapse (September 29th, 1905," etc.,

to and including the end of the first paragraph on page 4 of said amended reply, ending with the words:

"in conflict with the applicatory law, namely, the laws of the State of Missouri in such cases made and provided,"

for the following reasons:

(*a*) Because said allegations are all contained in plaintiff's second amended petition heretofore filed in this cause and are not new matter and are unnecessary and superfluous.

63 (*b*) Because said contentions and each of them have been ruled adversely to the plaintiff by the Supreme Court of Missouri en banc in its decision of November 27th, 1918, reported in 207 S. W. Rep., at page 230.

Second. Commencing at the beginning of the first paragraph on page 4, with the words:

"For further amended reply to defendant's said answer, plaintiff states that the defendant, in its amended answer upon which this cause went to trial the first time,"

continuing through the rest of the page and all of page 5, to the end of the first paragraph on page 6, ending with the words:

"were all adjudged illegal, null, void and of no force or effect by the Supreme Court of the State of Missouri on the date aforesaid, namely, on the 20th day of December, 1916,"

for the following reasons:

That said allegations are not a proper part of said reply, are scandalous, irrelevant and impertinent. That the reference to the

decision in this cause on the first appeal is improper, and that said allegations are contrary to said decision of the Supreme Court of Missouri and to the decision of the Supreme Court of Missouri en banc on said 27th day of November, 1918.

Third. Beginning with the commencement of the second paragraph on page 6 with the words:

"For further amended reply to defendant's said answer, plaintiff states that on the 17th day of March, 1913, the defendant filed its first answer herein,"

64 continuing through the rest of page 6 down to the end of the first paragraph on page 7, ending with the words:

"that there was no decision of the Supreme Court of Missouri conclusively deciding the points arising in said case, thereby waiving the right (if it existed) to invoke any other defense herein,"

for the reasons that said allegations are irrelevant and superfluous and are contrary to said decision of the Supreme Court of Missouri en banc rendered on said 27th day of November, 1918, and to the issues defined in said decision.

Fourth. That part of said amended reply commencing under Title II, on page 7 of the amended reply, with the words:

"For further amended reply to defendant's said answer, plaintiff states that the policy and policy loan agreement in this case are Missouri contracts,"

and continuing through page 7 and page 8 to the end of the first paragraph on page 9, ending with the words:

"contrary to and in violation of Section 1 of Article IV of the Constitution of the United States and Section 10 of Article II of the Constitution of the State of Missouri,"

for the reason that said allegations and each of them are not properly pleaded, are irrelevant and are contrary to the issues in this case as decided and defined by the Supreme Court of Missouri, in its decision en banc on said 27th day of November, 1918.

65 Fifth. That part of the reply commencing in the last paragraph on page 9, with the words:

"For further amended reply to defendant's said answer, plaintiff states that the common, unwritten and statutory laws of the State of New York",

continuing through page 9 and all of page 10 of said reply, and ending with the words at the bottom of page 10:

"contrary to and in violation of Section 1 of Article IV of the Constitution of the United States and Section 10 of Article II of the Constitution of the State of Missouri",

for the following reasons:

That said allegations are conclusions of law, not properly pleaded and are irrelevant and are contrary to the decision of the Supreme Court of Missouri en banc on November 27th, 1918, and to the issues as framed by said decision.

Sixth. That part of said reply commencing under Title III, at the top of page 11, with the words:

"For further amended reply to defendant's answer, plaintiff states that neither the application for said policy, nor a copy thereof",

continuing through page 11 and through the first paragraph on page 12, ending with the words:

"to repay said loan, were all, under the New York laws, illegal, null, void and of no force or effect whatsoever",

for the reason that said allegations are improperly pleaded; that said issue was not raised by the plaintiff at the time of the trial
66 of this cause, and it is now too late for the plaintiff to inject the same into the case, and for the further reason that the law of New York referred to in said allegation requiring applications to be attached to policy applies only to policies issued after January 1st, 1907, and does not apply to the policy in suit.

Seventh. That portion of said reply under Title IV, on page 12, commencing with the words:

"For further amended reply to defendant's said answer, plaintiff states that by the terms of said policy it was agreed",

continuing through the rest of said title IV, ending with the words on page 12:

"because the same enlarges on the policy, conflicts therewith, and is without any consideration whatsoever,"

for the reasons that said allegations were not made at the time the case went to trial, and it is now too late to insert the same, and for the further reason that said allegations are contrary to the decision of the Supreme Court of Missouri en banc, on November 27th, 1918.

Eighth. That portion of said reply under title V, at the bottom of page 12, commencing with the words:

"For further amended reply to defendant's said answer, plaintiff states that if the loan agreement is a contract of the State of New *New* York",

67 and continuing through to the end of the second paragraph, on said page, ending with the words:

"yet the same is subject to and governed by said policy and the laws of the State of Missouri,"

for the reason that said allegations are inconsistent, improperly pleaded and are contrary to the decision of the Supreme Court of Missouri en banc of November 27th, 1918.

Ninth. Commencing with the words under title VI, on page 13, of said reply:

"For further amended reply to defendant's said answer, plaintiff states that said policy contains the following incontestability stipulation",

and continuing through the rest of page 13 and down to the second paragraph on page 14, ending with the words:

"and precludes and bars the defendant from setting up the same as a defense herein",

for the reason that said allegations are improperly pleaded and said point was decided adversely to the contention of the plaintiff by the Supreme Court of Missouri in its first opinion in this case, reported in 269 Mo., at page 509.

Tenth. That part of said reply, under title X, on page 17, commencing with the words:

"For further amended reply to defendant's said answer, plaintiff states that said policy con of September, 1905, Frederick W. V. Blees was then suffering from a fatal disease",

68 and continuing through the rest of page 17, and through the first two paragraphs on page 18, ending with the words:

"under the laws of the State of New York, said policy was in force and effect at the time the insured died,"

for the reasons that said allegations are improperly pleaded and were not pleaded by the plaintiff at the time of the trial of this cause, and it is now too late to plead the same, and are contrary to the issues in this case as defined by the said decision of the Supreme Court en banc on November 27th, 1918.

Eleventh. That part of said reply commencing under title XI of the last paragraph on page 18 with the words:

"For further amended reply to defendant's said answer, plaintiff states that it was at the time Frederick W. V. Blees made application for the policy in suit,"

through all of said title, on page 18 and 19, and ending with the words on page 19:

"were acts all of which were null, void and of no binding effect,"

for the reasons that said allegations are inconsistent and contrary to the statements in the reply that the plaintiff joined with her husband,

Frederick W. V. Blees in the application and loan agreement, and constitute new matter which was not raised at the trial of the case, which it is now too late to insert.

Twelfth. That portion of the reply commencing under
69 title XII, at the bottom of page 19, with the words:

"For further amended reply to defendant's answer, plaintiff states that sections 1, 2 and 5 of title III of part II of chapter 4 of volume IV," etc.,

continuing through the rest of said title XII, on pages 19, 20, 21, and the top of page 22, ending with the words:

"said loan agreement and pledge are void because repugnant to and conflicting with the interest statutes of the State of New York above quoted,"

for the reasons that said allegations were not made at the time the case went to trial, and that same are contrary to the decision of the Supreme Court of Missouri en banc of November 27th, 1918.

Thirteenth. That part of said reply commencing under title XIII, on page 22, of said reply with the words:

"For further amended reply to defendant's said answer, plaintiff states that, upon the payment of the fourth annual premium," etc.,

continuing through the rest of said title, on pages 22 and 23, of said reply, ending with the words:

"the loan agreement and alleged cancellation of said policy are null, void and of no binding effect,"

for the reason that said allegations are already contained in the plaintiff's second amended petition in this cause, and are not
70 properly pleaded in this reply.

Fourteenth. That part of said reply, commencing under title XIV, on page 23, with the words:

"For further amended reply to defendant's said answer, plaintiff states that, out of said loan of $9,550," etc.,

continuing through the rest of said title, on pages 23 and 24, and ending with the words:

"and that the said defendant should have thus applied said excess, and thereby avoided the alleged forfeiture of said policy"

on page 24, for the reason that said allegations are already contained in the plaintiff's second amended petition in this cause, and are not properly pleaded in this reply.

Fifteenth. That part of said reply commencing under title XVI, on page 26, with the words:

"Finally, plaintiff denies that said loan agreement is a contract of the State of New York,"

and continuing through the rest of page 26, and ending with the words:

"said loan agreement is a contract of the State of Missouri, governed and controlled by the laws thereof"

71 on page 27, for the reason that the allegation is directly contrary to the issues in this case, as made by the Supreme Court of Missouri en banc on November 27th, 1918.

Respectfully submitted,

FORDYCE, HOLLIDAY & WHITE,
Attorneys for Defendant.

FREDERICK L. ALLEN,
Of Counsel.

On the 5th day of May, 1919, the court, overruled said motion to strike out parts of plaintiff's amended reply to defendant's answer to plaintiff's second amended reply, this being done at one of the days of the April Term, 1919, of said Circuit Court of said City of St. Louis, and on May 6th, 1919, being also one of the days of said April Term, 1919, of said Circuit Court of the City of St. Louis, the defendant presented its term bill of exceptions, which was by the Court signed and filed (caption omitted) and reads as follows:

Defendant's Term Bill of Exceptions.

Be it remembered, that in the progress of the above-entitled cause the following proceedings were had, to wit:

That on the 10th day of April, 1919, being one of the days of the April Term, 1919, of this Court, the defendant filed the following motion to strike out parts of plaintiff's amended reply to defendant's answer to plaintiff's second amended petition:

(The Clerk will here insert defendant's motion to strike out
72 parts of plaintiff's amended reply to defendant's answer to plaintiff's second amended petition filed herein on said 10th day of April, 1919.)

That said motion was placed upon the law docket of said court and argued and submitted, and that thereafter, to wit, on the 5th day of May, 1919, during said April Term, 1919, of said court, the Court overruled said motion, to which action and order of the Court said defendant then and there duly excepted and at the time saved its exceptions.

And in order that the above matters and things, rulings and exceptions may become and be made a part of the record in this cause, said defendant Mutual Life Insurance Company of New York tenders this its term bill of exceptions, and prays that the same may

be allowed, signed, sealed, filed and made a part of the record in this cause, which is accordingly done this 6th day of May, 1919, being one of the days of the said April Term, 1919, of said court.

CHARLES B. DAVIS,
Judge of Division No. 1 of the
Circuit Court of the City of St. Louis.

O. K.
JAMES J. O'DONOHOE,
Attorney for Plaintiff.
FORDYCE, HOLLIDAY & WHITE,
Attorneys for Defendant.

On May 12th, 1919, the trial of said cause was commenced in the Circuit Court of the City of St. Louis before the court and a jury, and the trial continued through May 13th, 1919, to the 14th
73 day of May, 1919, being one of the days of said April Term, 1919, of said court.

At the close of the case the Court instructed the jury to return a verdict in favor of plaintiff for the amount of the policy and interest, but left the question of damages and attorney's fees to the jury, and thereupon the jury returned a verdict in favor of plaintiff in the total amount of $107,542.09, this amount being itemized as follows:

Amount due under policy	$52,911.43
Interest	39,630.66
Damages	5,000.00
Attorney's fees	10,000.00
	$107,542.09

Within four days thereafter, to wit, on the 16th day of May, 1919, being one of the days of said April Term, 1919, of said court, the defendant filed its motion, for new trial and motion in arrest of judgment, which motions were by the court taken under advisement and continued to the June Term of said Court.

And thereafter, to wit: on the 30th day of June, 1919, being one of the days of the June Term of said court, defendant's said motion for new trial and defendant's said motion in arrest of judgment were overruled.

Exceptions to all of the adverse rulings of the court were duly saved by the defendant, as will appear from the bill of exceptions hereinafter contained.

Thereafter, on the 1st day of July, 1919, being one of the days of said June Term, 1919, of said court, the defendant was al-
74 lowed one hundred and twenty days in which to file its bill of exceptions, the defendant's appeal bond was fixed at $125,000 and the defendant filed its affidavit for appeal, which

appeal was duly allowed the defendant on said 1st day of July, 1919, being one of the days of the June Term, 1919, of said court, to the Supreme Court of Missouri, by order of court duly entered, and thereafter, to wit: on the 2d day of July, 1919, the defendant's appeal bond in the sum of $125,000 with surety, was approved by the court and filed.

Thereafter, on the 26th day of September, 1919, being one of the days of said June Term, 1919, of said court and within the time theretofore allowed by the court for so doing, the defendant's bill of exceptions was allowed, signed by the court and filed and made a part of the record herein by order of court duly entered of record, said bill of exceptions being duly endorsed:

"Filed September 26th, 1919. Nat Goldstein, Clerk."

With caption omitted, the bill of exceptions is as follows:

Bill of Exceptions.

Be it remembered, that at the April Term, A. D. 1919, of the above-entitled court, and beginning on the 12th day of May, 1919, the above-entitled court before the Honorable Robert W. Hall, Judge of said court, and a jury, and continuing from day
75 to day, as shown by the following bill of exceptions, the following proceedings were had, to wit:

Appearances:

J. J. O'Donohoe, Esq., for the plaintiff.
Messrs. Fordyce, Holliday & White, by John H. Holliday, Esq., for the defendant.

Mr. Holliday: The Judge has just said on our agreement it will be understood that exceptions will be saved to all adverse rulings without the necessity of counsel claiming exception at the time.

Mr. Holliday: Now, I want the record to show on behalf of the defendant that the defendant objects to reading to the jury all those portions of the plaintiff's amended reply to the defendant's answer to plaintiff's second amended petition that were attacked in the motion to strike out heretofore filed by the defendant on the 10th day of April, 1919.

The Court: Overruled.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

Mr. O'Donohoe reads reply.

Mr. Holliday: Now, if your Honor please, I wish to renew my motion to strike out all those parts in this reply covered by motion to strike out, which was filed in this case on April 10th, 1919, and that the jury be requested to disregard those portions of said reply.

The Court: In view of the ruling of Division No. 1, I will have to overrule your motion.

76 Mr. Holliday: I believe it is understood exceptions are saved to adverse rulings.

The Court: Yes.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

Thereupon, the Court took a recess until 12:29 o'clock p. m. of the same day, May 12th, 1919, at which day and hour court was duly reconvened, and the jury being present, as before, the following proceedings were had, to wit:

Mr. O'Donohoe: If the Court please, I offer in evidence the policy in suit.

The Court: Were you going to make any opening statement?

Mr. O'Donohoe: I thought inasmuch as the pleadings covered our views I would not consume the time of the Court and jury with any statement.

The Court: All right.

Mr. O'Donohoe: I ask that it be marked "Plaintiff's Exhibit 1."

(Thereupon the reporter marked the same "Plaintiff's Exhibit 1.")

Mr. Holliday: Defendant, your Honor, objects to any reference to this policy, except as incidental to the issues now remaining in this case after the last decision of the Supreme Court of the State of Missouri; in other words, that the policy is not, of course, we maintain is not valid or in force, or in effect, but was canceled.

The Court: You mean limit the offer to the loan feature?

77 Mr. Holliday: To the loan feature of this case.

The Court: Objection overruled.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

Said Plaintiff's Exhibit 1 is in words and figures as follows:

PLAINTIFF'S EXHIBIT 1.

The Mutual Life Insurance Company of New York.

Promises to deliver to Frederick W. V. Blees, the insured, of Macon, in the County of Macon, State of Missouri, his executors, administrators or assigns, fifty bonds, each of the denomination of one thousand dollars, to be issued by this company, and payable twenty years from the first day of January or July next ensuing the date thereof, in gold coin of the United States of America of the present standard of weight and fineness, with interest thereon at the rate of 5 per centum per annum payable in like gold coin semiannually on the first days of January and July.

The delivery of the bonds shall be conditional upon the surrender of this contract after it shall have been maintained in full force and effect until its termination, and the acceptance of satisfactory proofs of the death of the said Frederick W. V. Blees, of Macon, in the County of Macon, State of Missouri, the person subscribing to the proposal for this contract and known herein as the insured,
78 which proposal is of the essence of this mutual obligation.

This contract is subject to the mutual agreements endorsed hereon, and is issued upon the condition that on its delivery there shall be deposited with the company the sum of forty-two hundred and ninety-one dollars and fifty cents in gold coin as above described and that an annual deposit in gold coin of a like amount shall be made thereafter on the twenty-ninth day of September during the first ten years of the continuance of this contract.

The receipt of the first deposit hereon is acknowledged.

New York September 29, 1901.

NICHOLAS A. McCURDY,
President.

NEWKIRK CAMROLL,
Assistant Secretary.

Number 1,207,072.
Bonds, $50,000.
Cash option, $65,250.
Age 41 years.
Annual deposit for 10 years, $4,291.50.
Date of issue referred to in application and herein is 31st day of December, 1901.

Mutual Agreements.

Deposits.—Each deposit is to be made at the head office of the company in the City of New York, but will be accepted else-
79 where when duly made in exchange for the company's receipt signed by the president or secretary.

Grace in Making the Deposits.—A grace of thirty days will be allowed in the payment of all renewal deposits. Interest at the rate of five per cent per annum will be charged for the grace period taken and this contract shall remain in full force and effect during such period, provided, that in case of the death of the insured during any such period the amount of the deferred deposit and interest shall be paid in cash before the delivery of the bonds as hereinbefore provided.

Automatic Paid-up Insurance.—After three full years' deposits have been made hereon, upon the failure to make any subsequent deposit, this contract will become a non-participating gold coin contract for paid-up life insurance, payable in one sum on the death of the insured, for the amount provided for in the table of guarantees attached hereto, for the end of the last year for which complete annual deposits shall have been made; provided there be no unpaid

loan hereon. Said table shall contain the guarantees applicable to this contract for the end of the last year for which complete annual deposits shall have been made, according to the figures for such guarantees as prepared by the company for the plan and age of insured under this contract.

Extended Insurance.—After three full years' deposits have been made hereon, upon the failure to make any subsequent deposit, if this contract be surrendered within the thirty days of grace, or on satisfactory medical examination within twelve months from the due date of the deposit, the company will issue in lieu thereof a
80 paid-up non-participating contract providing for the delivery of the gold bonds herein mentioned if the insured shall die within the number of years and months provided for in the table of guarantees attached hereto for the end of the last year for which complete annual deposits shall have been made, and not otherwise; provided there be no unpaid loan hereon. Said table shall contain the guarantees applicable to this contract for the end of the last year for which complete annual deposits shall have been made according to the figures for such guarantees as prepared by the company for the plan and age of insured under this contract.

Cash Surrender Value.—After three full years' deposits have been made hereon, upon the failure to make any subsequent deposits on the date called for in this contract, and within sixty days thereafter, or at any time after all the deposits required have been made, this contract may be surrendered and the company will pay therefor, within sixty days from the date of such surrender, the amount in gold coin as provided in the table attached hereto for the end of the last completed contract year, deducting any unpaid loan hereon. Said table shall contain the guarantees applicable to this contract for the end of the last completed contract year according to the figures for such guarantees as prepared by the company for the plan and age of insured under this contract.

Loans.—After this contract shall have been in force three full years, within sixty days after written application, and upon the assignment of this contract as security, the company will, in conformity with its rule as then in force, loan amounts within the limits
81 of the cash surrender value, with interest in advance, at the rate of five per cent per annum, provided: (1) that the deposits be fully made to the end of the contract year in which the loan falls due; (2) that in any settlement of this contract all outstanding indebtedness hereon to the company must be paid. All payments hereon of loans and interest shall be made in gold coin.

Surplus.—The first distributive share of surplus shall be apportioned to this contract, if in force at the expiration of twenty years from date, and can be (1) drawn in gold coin; or (2) applied to the purchase of an annuity; or (3) applied on satisfactory medical examination to purchase additional paid-up insurance payable in one sum in gold coin on the death of the insured. If two years' notice

of the selection of the third option be given to the company, the surplus shall be so applied without examination. Subsequent distributions shall be made annually during the continuance of this contract.

Cash Option in Lieu of Bonds.—It is hereby mutually understood and agreed between all the parties hereto, that the beneficiary under this contract shall have the option of accepting in settlement of this contract, when it matures under its terms, the sum of sixty-five thousand two hundred and fifty gold dollars in lieu of the issuance of fifty thousand dollars of bonds as stipulated in said contract, provided all deposits previously due thereon shall have been made and the contract maintained in full force and effect from date of issue.

Residence, Travel and Occupation.—This contract is free
82 from restrictions as to residence, travel and occupation, after two years from date of issue, except military or naval service in time of war, for which permission must be obtained at the company's regular rates.

Admission of Age.—The company will admit the age of the insured upon satisfoctary proof; failing such proof, if the age shall have been understated, the amount of insurance or other benefit will be equitably adjusted.

Incontestability.—After two years from date of issue this contract shall be incontestable if the deposits shall have been duly made.

Notice.—No person, except an executive officer of the company or its secretary at its head office in New York, has power on behalf of the company to make, modify or alter this contract, to extend the time for making any deposit, to bind the company by making any promise or by accepting any representation or information not contained in the application for this contract. Any interlineations, additions or erasures must be attested by the signature of one of the above-named officers. Proofs of death will be required on the forms prescribed by the company, which will be furnished on request.

Assignments.—The Company declines to notice any assignment of this contract until the original assignment, or a duplicate or certified copy thereof, shall be filed in the company's head office. The company will not assume any responsibility for the validity of an assignment.

W. J. EASTON,
Secretary.

83 The Mutual Life Insurance Company of New York.

Richard A. McCurdy, President.

Age of insured, 41.
Five per cent twenty year gold bonds—Life.
Ten payments. Twenty-Year D. P.

Guarantees Corresponding to Each Bond of $1,000 *and in Lieu Thereof.*

For end of year.	Automatic paid-up insurance.	Extended insurance from date of failure to make deposit. Years.	Months.	Cash surrender value.
3d.....	$392	10	0	$124
4th.....	522	12	11	191
5th.....	653	15	7	275
6th.....	783	18	1	356
7th.....	914	20	6	440
8th.....	1,044	22	11	530
9th.....	1,175	25	7	622
10th		Full Paid		722
11th				739
12th				756
13th				774
14th				792
15th				810
16th				829
17th				848
18th				868
19th				889
20th				910
21st				910
22d				910
23d				910
24th				916
25th				929

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26th				942
27th				955
28th				967
29th				979
30th				990

NOTE.—The amounts of paid-up insurance and the cash values stated above are on the basis of $1,000 and apply pro rata to the amount of bonds secured by the contract. The terms of extended insurance are the same for all amounts.

W. J. EASTON, *Secretary.*

Copy of Form of Five Per Cent Twenty-year Gold Bond Deliverable at Maturity of Within Contract.

UNITED STATES OF AMERICA,

STATE OF NEW YORK.

The Mutual Life Insurance Company of New York.

Bond No. —0 0 0—.

This Bond Certifies that for value received there will be due to .....Specimen..... or bearer from The Mutual Life Insurance Company of New York, one thousand dollars in gold coin of the United States of America of the present standard of weight and fineness, which the said company hereby promises to pay at the office of the United States Mortgage and Trust Company in the City of New York, on the first day of .....* * * * *.....with interest at the rate of five per centum per annum, payable semiannually, in like coin, at the office of the said United States Mortgage and
85 Trust Company, on the first days of January and July in each year during the continuance of this bond, on presentation and surrender of the respective interest coupons hereto attached as they severally become due.

This bond is isuued by the Mutual Life Insurance Company of New York, in accordance with the terms and mutual agreements contained in its five per cent twenty-year gold bond contract numbered ...* * *...

In Witness Whereof, the said Mutual Life Insurance Company of New York has caused its corporate seal to be hereto affixed, and the same to be attested by the signatures of its president and secretary, and has also caused this bond to be countersigned by its treasurer at the head offices of the company in the City of New York, the ..... * * ..... day of .....* * *....., 19....* *.

.....Specimen.....,
President.

.....Specimen.....,
Secretary.

Countersigned by

Specimen,
Treasurer.

[L. S.]

Supplementary.

$ * On the first day of January, 19 * * $ *

The Mutual Life Insurance Company of New York will pay the bearer at the United States Mortgage and Trust Company, in the City of New York, ...* * * * *..... dollars in gold coin, being .....* *..... months' interest on its bond No. .....* *..... (Series No. .....* *.....).

.....Specimen.....,
Treasurer.

86 No. 1.

$25.00 On the first day of July, 19 * *.. $25.00

The Mutual Life Insurance Company of New York will pay the bearer twenty-five dollars in gold coin at the United States Mortgage and Trust Company, in the City of New York, being six months' interest on its bond No. ....* * *.... (Series No. ....* *....).

.....Specimen.....,
Treasurer.

The bonds to be issued in accordance with the provisions of this contract, shall mature in twenty years from the first day of the January or July next following the date of acceptance of the proofs of death, and each of the said bonds shall carry a supplementary interest coupon for the time between the acceptance of the proofs of death and the first ensuing regular interest day.

Mr. O'Donohoe: It may be understood, I suppose, that we will read only such parts to the jury that are necessary, each side to refer to such portion.

The Court: Any objection?

Mr. Holliday: It may be understood that the policy may be in evidence, with the right of either side to refer to such portions as they desire.

Mr. O'Donohoe (reading): The Mutual Life Insurance Company of New York promises to deliver to Frederick W. V. Blees, the insured, of Macon, in the County of Macon, State of Missouri, his executors, administrators or assigns, fifty bonds, each of the denomination of one thousand dollars, to be issued by this company, and payable twenty years from the first day of January or July,
87 next, ensuing the date thereof, in gold coin of the United States of America of the present standard of weight and fineness, with interest thereon at the rate of five per centum per annum, payable in like gold coin, semi-annually, on the first days of January and July. The delivery of the bonds shall be conditional upon the surrender of this contract after it shall have been maintained in full force and effect until its termination, and the acceptance of

satisfactory proofs of the death of the said Frederick W. V. Blees, of Macon, in the County of Macon, State of Missouri, the person subscribing to the proposal for this contract and known herein as the insured, which proposal is of the essence of this mutual obligation. This contract is subject to the mutual agreements endorsed hereon, and is issued upon the condition that, on its delivery, there shall be deposited with the company the sum of forty-two hundred and ninety-one dollars and fifty cents in gold coin, as above described, and that an annual deposit in gold coin of a like amount shall be made thereafter on the twenty-ninth day of September during the first ten years of the continuance of this contract. The receipt of the first deposit hereon is acknowledged. New York, September 29, 1901. Richard A. McCurdy, President. Frank Camroll, Assistant Secretary. Date of issue referred to in application and herein is 31st day of December, 1901.

Mr. O'Donohoe: Under the caption, Automatic Paid-Up Insurance, the following appears: After three full years' deposits have been made hereon, upon the failure to make any subsequent deposit, this contract will become a nonparticipating gold coin contract for paid-
up life insurance, payable in one sum on the death of the
88 insured, for the amount provided for in the table of guarantees attached hereto, for the end of the last year for which complete annual deposits shall have been made; provided, there be no unpaid loan hereon. Said table shall contain the guarantees applicable to this contract for the end of the last year for which complete annual deposits shall have been made, according to the figures for such guarantees, as prepared by the company for the plan and age of insured under this contract.

Mr. Holliday: Now, if your Honor please, at this point I move that that portion of the policy just read by Mr. O'Donohoe, and headed Automatic Paid-Up Insurance, be stricken out and the jury instructed to disregard same for the reason not only it is not one of the issues in this case as defined by the Supreme Court of Missouri, but also that the policy states on its face he has no right to apply for paid-up insurance on account of the loan debt. There was an unpaid loan on this policy at the date of lapse.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted, and still objects and excepts.

Mr. O'Donohoe: At the end of the fourth policy year, the table of values referred to under the caption Automatic Paid-Up Insurance, is $522 per thousand.

Mr. O'Donohoe: Under the caption Extended Insurance, the following appears: After three full years' deposits have been made hereon, upon the failure to make any subsequent deposit, if this contract be surrounded within the thirty days of grace, or on satisfactory medical examination within twelve months from the
89 due date of the deposit, the company will issue in lieu thereof a paid-up non-participating contract providing for the delivery of the gold bonds herein mentioned if the insured shall die

within the number of years and months provided for in the Table of Guarantees attached hereto for the end of the last year for which complete annual deposits shall have been made, and not otherwise; provided there be no unpaid loan hereon. Said table shall contain the guarantees applicable to this contract for the end of the last year for which complete annual deposits shall have been made according to the figures for such guarantees as prepared by the company for the plan and age of insured under this contract.

Mr. Holliday: If your Honor please, I move that that portion read to the jury by Mr. O'Donohoe be stricken out and the jury instructed to disregard the same, not only for the reason it forms no part of the issue in this case defined by the Supreme Court, but, furthermore, the policy itself shows no right to extended insurance unless the policy was surrendered within the thirty days of grace; also that there is no right to extended insurance since there was an unpaid loan on the policy at the date of lapse.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted, and still objects and excepts.

The Court: I take it your objection to the introduction of the policy will be enough.

Mr. O'Donohoe: At the end of the third policy year extended from date of failure to make deposit, 10 years; at the end
90 of the fourth policy year, extended from date of failure to make deposit 12 years and 11 months.

Mr. O'Donohoe (reading): Cash Surrender Value—After three full years' deposits have been made thereon, upon the failure to make any subsequent deposit on the date called for in this contract, and within sixty days thereafter, or at any time after all the deposits required have been made, this contract may be surrendered and the company will pay therefor, within sixty days from the date of such surrender, the amount in gold coin as provided in the table attached hereto for the end of the last completed contract year, deducting any unpaid loan hereon. Said table shall contain the guarantees applicable to this contract for the end of the last completed contract year according to the figures for such guarantees as prepared by the company for the plan and age of insured under this contract.

Mr. O'Donohoe: According to the table of values attached, at the end of the third policy year the cash surrender value is $124, and at the end of the fourth policy year it is $191.

Mr. Holliday: Pardon me, your Honor, but I think he had better explain to the jury that means $124 and $191 for each thousand-dollar bond.

Mr. O'Donohoe: Yes, when I say $522 paid-up value at the end of the fourth policy year, I mean per thousand, and when I say $124 at the end of the third policy year, and $191 at the end of the fourth policy year, I mean per thousand, $124 per thousand, $191 per thousand.

The Court: Fifty thousand in bulk?

Mr. O'Donohoe: What is it, your Honor?

91 The Court: Fifty thousand the amount covered——

Mr. O'Donohoe: Sixty-five thousand two hundred fifty.

Mr. Holliday: No, that is just the very point we oughtn't to have any misunderstanding about; these values are stated per one thousand dollar bond, and there are fifty one thousand dollar bonds.

The Court: With the option, I understand, after death, to accept in lieu of bonds and interest, $65,000.

Mr. Holliday: That is simply an option given to the insured to take cash instead of twenty-year gold bonds, but these figures Mr. O'Donohoe refers to do not apply; it says $124 per thousand for each gold bond, that is 50——

Mr. O'Donohoe: That is correct.

Mr. Donohoe (reading): Loans—After this contract shall have been in force three full years, within sixty days after written application, and upon the assignment of this contract as security, the company will, in conformity with its rules as then in force, loan amounts within the limits of the cash surrender value, with interest in advance, at the rate of 5 per cent per annum, provided: (1) that the deposits be fully made to the end of the contract year in which the loan falls due; (2) that in any settlement of this contract all outstanding indebtedness hereon to the company must be paid. All payments hereon of loans and interest shall be made in gold coin.

Mr. O'Donohoe (reading): Surplus. The first distributive share of surplus shall be apportioned to this contract, if in force at the expiration of twenty years from date, and can be (1) drawn in gold coin; or (2) applied to the purchase of an annuity; or (3) applied on satisfactory medical examination to purchase additional
92 paid-up insurance, payable in one sum in gold coin on the death of the insured. If two years' notice of the selection of the third option be given to the company, the surplus shall be so applied without examination. Subsequent distribuions shall be made annually during the continuance of this contract.

Mr. Holliday: Now, if your Honor please, I move that that portion of the policy under the heading Surplus, just read by Mr. O'Donohoe to the jury, be stricken out, not only for the reason it is utterly irrelevant under the issues remaining in this case, but for the further reason it appears on its face there was to be no right to any share of the surplus on this policy unless and until it had been in force twenty years, and it appears plainly from the pleadings and issues in this case that the policy lapsed at the end of five years, and Mr. Blees died at the end of six years, so, under either of them, there never could be any distributive share of this policy.

Which objection was, by the Court, overruled; to which action and ruling of the Court, defendant, by its counsel, then and there duly objected and excepted, and still objects and excepts.

Mr. O'Donohoe (reading): Cash Option in Lieu of Bonds. It is hereby mutually understood and agreed between all the parties hereto that the beneficiary under this contract shall have the option of accepting in settlement of this contract, when it matures under

its terms, the sum of sixty-five thousand two hundred and fifty gold dollars in lieu of the issuance of fifty thousand dollars of bonds as stipulated in said contract; provided, all deposits previously
93 due thereon shall have been made and the contract maintained in full force and effect from date of issue.

Mr. O'Donohoe (reading): Incontestability. After two years from date of issue, this contract shall be incontestable if the deposits shall have been duly made.

Mr. Holliday: I move that that portion of the policy relating, under the heading Incontestability, just read by Mr. O'Donohoe, be stricken out, and the jury instructed to disregard the same, not only because it is not part of the issues in the case framed by the last decision of the Supreme Court, but because, in the first decision of the Supreme Court, on the point raised by Mr. O'Donohoe and directly ruled against him, it appears, on its face, the policy is only incontestable if all premiums are paid; it is stipulated that premium due in 1905 on this policy was not paid.

The Court: Overruled.

Mr. O'Donohoe: It has not been ruled, your Honor, against the plaintiff.

The Court: I don't find anything in that 269th on that question. Overruled.

To which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

Thereupon, the Court duly and properly admonished the jury as to the proper conduct of its members while court should not be in session, and the court then took a recess until 2 o'clock p. m. of the same day, May 12th, 1919; at which day and hour court was duly reconvened and the jury being present as before, the following proceedings were had, to wit:

94 Mr. O'Donohoe: If the Court please, I ask that certificate of authority of the defendant to do business in Missouri in 1901 be marked "Plaintiff's Exhibit 2"; and its authority and license to do business in Missouri in 1904, be marked "Plaintiff's Exhibit 3."

(Thereupon the reporter marked the respective documents "Plaintiff's Exhibit 2," and "Plaintiff's Exhibit 3.")

Mr. O'Donohoe: I offer in evidence Plaintiff's Exhibit 2, your Honor.

Mr. Holliday: Now, if your Honor please, I object to these exhibits being offered or read in evidence, for the reason that our answer in this case admits that the defendant company is now doing business in Missouri under license, and has been doing business in Missouri under license at all of the times mentioned in the petition. I can't see what useful purpose it would serve to encumber the record with these certified copies.

Mr. O'Donohoe: That is not the purpose for which it is offered; the purpose for which it is offered is that it was allowed to do business

in Missouri subject to the provisions of the laws of the State of Missouri.

The Court: It may be offered.

Mr. Holliday: Well, then if the purpose of Mr. O'Donohoe, in offering these licenses to do business in Missouri is to attempt to prove that the Missouri law in any way controls or affects the loan agreement in this case, or action taken thereunder, then I further object to the offer of these exhibits in evidence because this loan agreement was executed in the State of New York, was to be performed in the State of New York, and to apply the Missouri laws to a New York contract would be to deprive us of the full faith and credit to
95 which the acts and judicial proceedings and decisions of the State of New York are entitled, in violation of section 1 of Article IV of the Constitution of the United States.

The Court: I understand you object to the introduction of any evidence other than that pertaining to the loan feature.

Mr. Holliday: Yes, your Honor.

The Court: That objection may be shown throughout the introduction of evidence on the part of the plaintiff, and you won't have to make your objections.

Which objection to the introduction in evidence of Plaintiff's Exhibit 2 was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

Said Plaintiff's Exhibit 2 is in words and figures, as follows:

PLAINTIFF'S EXHIBIT 2.

Certificate of Authority.

Renewable Annually March 1st.

Insurance Department of the State of Missouri.

It is hereby certified that the Mutual Life Insurance Company of New York, New York, has complied with the requirements of the insurance laws of this State, and is hereby authorized, subject to the provisions thereof, to do the business of life insurance in the State of Missouri until the first day of March, one thousand nine hundred and two.

96 In witness whereof, I, Ed T. Orear, Superintendent of the Insurance Department of the State of Missouri, have hereunto set my hand and affixed my seal of office, in duplicate, at City of Jefferson, this first day of March, 1901.

[L. S.]

ED T. OREAR,
Superintendent.

STATE OF MISSOURI.

Insurance Department.

I, Alfred L. Harty, Superintendent of the Insurance Department of the State of Missouri, do hereby certify that the above and foregoing is a true and correct copy of the original certificate of authority issued to the Mutual Life Insurance Company, of New York, New York, for the year ending March 1st, 1902, of which said original is now on file in this department.

In testimony whereof, I have hereunto set my hand and caused to be hereto affixed the seal of said department, at my office in the City of Jefferson, this 18th day of January, 1919.

[SEAL.] ALFRED L. HARTY,
Superintendent,
By E. G. McGEE,
Chief Clerk.

Mr. O'Donohoe: I now offer in evidence Plaintiff's Exhibit 3.
Mr. Holliday: I make the same objection to the offer.
The Court: Same ruling.

97 Which objection was, by the Court, overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted, and still objects and excepts.

Said Plaintiff's Exhibit 3 is, in words and figures, as follows:

PLAINTIFF'S EXHIBIT 3.

Certificate of Authority.

Renewable Annually March 1st.

Insurance Department of the State of Missouri.

It is hereby certified, that the Mutual Life Insurance Company of New York, New York, has complied with the requirements of the insurance laws of this State, and is hereby authorized, subject to the provisions thereof, to do the business of life insurance in the State of Missouri until the first day of March, one thousand nine hundred and five.

In witness whereof, I, R. G. Yates, Superintendent of the Insurance Department of the State of Missouri, have hereunto set my hand and affixed my seal of office, in duplicate, at City of Jefferson, this first day of March, 1904.

[L. S.] R. G. YATES,
Superintendent.

STATE OF MISSOURI.

Insurance Department.

I, Alfred L. Harty, Superintendent of the Insurance Department of the State of Missouri, do hereby certify that the above and foregoing is a true and correct copy of the original Certificate of
98 Authority for the year ending March 1st, 1905, of the Mutual Life Insurance Company of New York, N. Y., which said original is now on file in this department.

In testimony whereof, I have hereunto set my hand and caused to be hereto affixed the seal of said department, at my office in the City of Jefferson, this 2nd day of May, 1919.

[SEAL.] ALFRED L. HARTY,
Superintendent.
By E. G. McGEE,
Chief Clerk.

Mrs. MARY S. BLEES LIEBING, being first duly sworn by the clerk to tell the truth, the whole truth and nothing but the truth, testified on her own behalf as plaintiff, as follows:

Direct examination.

By Mr. O'Donohoe:

Q. What is your name?
A. Mary S. Blees Liebing.
Q. Are you the plaintiff in this case?
A. Yes, sir.
Q. Speak a little louder, please.
A. Yes, sir.
Q. Where were you born?
A. Beg pardon?
Q. Where were you born?
A. Born, Mobile, Alabama.
Q. Was your father a native American?
A. Yes, sir.
Q. Born in America?
A. Born in Richmond, Virginia.
Q. Are you a citizen of the United States?
A. Yes, sir.
Q. Where did you live in 1901?
A. Macon, Missouri.
99 Q. Were you then a resident of Macon, State of Missouri?
A. Yes, sir.
Q. How long have you been such?
A. Since 19, 1891.
Q. Frederick W. V. Blees was your husband, was he?
A. Yes, sir.

Q. The one whose life was insured under the policy in suit?
A. Yes, sir.
Q. Where did he reside in 1901?
A. In Macon, Missouri.
Q. Was he then a citizen of the United States?
A. Yes, sir.
Q. How long had he resided in the State of Missouri?
A. Since 19, 1891.
Q. How long afterwards did he continue to live at Macon, in the State of Missouri?
A. Until 1906; September 29th he died.
Q. September what?
A. September 8 he died—1906.
Q. He died?
A. Yes, sir.
Q. He was then a resident and citizen of Missouri?
A. Yes, sir.
Q. Do you recall when Frederick W. V. Blees, your husband, made application for the policy in suit?
A. In 1901.
Q. Where did he make application for it?
A. In Macon.
Q. To whom?
A. To Mr. D. H. Payson.
Q. Were you present when the application was signed at Macon, Missouri?
A. Yes, sir.
Q. What became then of the application for this policy?
A. Why, it was turned over to Mr. Payson.
100 Q. Do you recall when this policy, I mean the policy in suit, was delivered?
A. It was delivered in 1901.
Q. Where was it delivered?
A. At Blees Military Academy, Macon, Missouri.
Q. At the time of its delivery, what, if anything, was done?
A. There wasn't anything done but to pay the premium on it.
Q. The premium, first annual premium, was paid?
A. Yes, sir.
Q. To whom?
A. To Mr. Payson.
Q. Where?
A. In Macon, at the Academy.
Q. Macon, Missouri?
A. Yes, sir.
Q. Now, were there any other premiums paid on this policy?
A. Yes.
Q. How many?
A. We paid 1901, 1902, 1903, 1904.
Q. Where were those premiums paid?
A. In Macon.
Q. To whom?

A. To Mr. Payson.
Q. Who was Mr. Payson?
A. Mr. Payson was the insurance company's agent there at Macon, Missouri.
Q. You mean the Mutual Life?
A. Yes, sir.
Q. (Continuing:) Insurance Company's Agent?
A. Yes, sir.
Q. Afterwards was there any loan made on the policy?
A. Yes.
Q. Where?
A. At Macon.

Mr. Holliday: Now, if you Honor please, I object to that question and move that the answer be stricken out; she had answered too quickly for me to get my objection in; the loan agreement in this case is in writing and speaks for itself; best evidence.
Mr. O'Donohoe: She can testify as well as the loan agreement, your Honor.
The Court: Read the last question.

101 (Thereupon the reporter read the two previous questionsand answers, as follows: Q. Afterwards was there any loan made on the policy? A. Yes. Q. Where? A. At Macon.)

The Court: It may stand.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted, and still objects and excepts.

Mr. Holliday: The answer is also objectionable, your Honor, since it calls for a conclusion of law from this witness instead of a statement of fact.
The Court: Well, you might state where the negotiations were entered into; tell what was done there.

Mr. O'Donohoe:

Q. What sum was borrowed by you and your husband on the policy, if any sum?
A. Nine thousand five hundred and fifty dollars.
Q. Nine what?
A. Nine thousand five hundred and fifty dollars.
Q. What way was that applied, or what was it applied to, $9,550?

Mr. Holliday: Now, if your Honor please, I renew my objection to all this line of questions; the loan agreement in this case is in writing; it is here and ready to be produced if Mr. O'Donohoe wants to use it.
The Court: I assume that will be offered later, will it?
Mr. O'Donohoe: If the defendant wants to offer it, we shall object to it if it is offered.
Mr. Holliday: Then I certainly object to it if Mr. O'Donohoe says

now he is going to object to the written loan agreement when
102 it is offered; I certainly object to his interrogating this witness about the contents of it.

Mr. O'Donohoe: I am not interrogating at all about the contents of any loan agreement; the policy stipulates that at the end of the fourth policy year, the plaintiff in this case, or her husband, was entitled to certain loans.

The Court: After a certain number of premiums have been paid?

Mr. O'Donohoe: Yes, your Honor; they are entitled to a certain loan, certain loan on the policy, and all they have to do is to demand it and the company must make it; you don't have to sign any intricate or involved loan agreements; all they have to do is to demand it.

The Court: Proceed.

Mr. Holliday: The fact remains that in this case there was a written loan agreement and that the terms of it are set out in writing; it is obviously improper to let this witness testify about what was in the agreement.

Mr. O'Donohoe: I am not asking her to testify to what was in the agreement.

The Court: Proceed.

Which objection was, by the Court, overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepts, and still objects and excepts.

The Witness: I have forgotten the question.

The Court: Is there a question; to what was that applied, I understand is the last question, if you know.

103 Mr. O'Donohoe:

Q. What is your answer?

A. The premium was to be paid, which was due at that time, and $468 interest on the loan, and the check was given to Mr. Blees for $4,790.50.

Q. What became of that check that was given to Mr. Blees?

A. I suppose he deposited it.

Q. Where?

A. In the National Bank of Commerce here; was his bank.

Mr. Holliday: Now, I move, your Honor, that the winess be cautioned not to testify to anything she doesn't know of her own personal knowledge; she is giving here her assumption; she says she assumes he deposited it in the Bank of Commerce.

The Court:

Q. Do you know, Mrs. Liebing, whether it was deposited or not?

A. Only through his giving me a check on this National Bank of Commerce.

Mr. O'Donohoe:

Q. Who did Mr. Blees see with respect to the making of this loan?
A. Mr. Payson.
Q. Where did he see him?
A. At Mr. Payson's office.
Q. Where?
A. In Macon, Missouri.
Q. With whom was the agreement that you have just testified to, concerning the application of the loan of $9,550?

Mr. Holliday: Just a minute; may I hear that question again?

(Thereupon, the reporter read the question as follows: Q. With whom was the agreement that you have just testified to, concerning the application of the loan of $9,550?)

A. Mr. Payson.

Mr. Holliday: Just a minute; I certainly object to that question, your Honor; this is obviously improper testimony and Mr.
104 O'Donohoe knows it; he is seeking to elicit from this witness something about a written loan agreement, which has already been in testimony in this case, which is pleaded in this case.

The Court: You will have an opportunity on cross-examination——

Mr. Holliday: I know, your Honor, by your rulings you have permitted him to establish by verbal testimony an agreement which was in writing.

Mr. O'Donohoe: The written agreement, your Honor, was not a part of the policy, and can cut no figure in this case whatever.

The Court: I can only assume that it was in writing; I don't know.

Which objection was, by the Court, overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted, and still objects and excepts.

Mr. O'Donohoe:

Q. Did Mr. Blees or yourself have any transaction with the home office in New York?
A. No, sir.

Mr. Holliday: I object to that as calling for a conclusion of the witness, and ask that the answer be stricken out; she should state the facts.

The Court: Well, I think a person can state whether or not that is a positive statement, whether they had any business transaction with the home office at New York; it may stand.

Which objection was, by the Court, overruled; to which action and ruling of the Court, defendant, by its counsel, then and there duly objected and excepted, and still objects and excepts.

105 Mr. O'Donohoe:

Q. Did Mr. Blees or yourself have any notice of the maturity of this loan?

Mr. Holliday: That is objected to as irrelevant and immaterial in this case.

The Court: She may answer.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

A. No, sir.

Mr. O'Donohoe:

Q. Did you have any notice?
A. No.
Q. From the defendant?
A. No.
Q. To the effect that the fifth annual premium was due?
A. No.
Q. Did you have any notice from the defendant that it was to foreclose the policy in this case?
A. No.
Q. Either on the 29th day of September, 1905, or at any other date?
A. No.
Q. How old was Mr. Blees on the 29th day of September, 1901, when the policy was applied for?
A. He was in his 47th year when he died; he would have been 47 years old in March, the following March, and he died in September.
Q. How old, I asked you, was he on the 29th day of September, 1901?
A. He was 43 years old.
Q. How?
A. Forty-four years old.
Q. In nineteen hundred and——
A. No; I will just have to count back; he must have been 41 years old.
Q. How is that?
A. Forty-one years old.
Q. Forty-one; how old was he on the 29th day of September, 1905?

A. He was 46 years old; no, 45 years old; he would have
106 been; he was 46 years old when he died, in his 47th year.

Q. I will ask you the question again: How old was Mr. Blees on the 29th day of September, 1905?
A. He was 45 years old.
Q. After this policy was issued did Mr. Blees, the assured, make any assignment of it to you?
A. Yes.

Q. I show you a paper which I shall ask to be marked "Plaintiff's Exhibit 4," and ask you to state whether or not that is the assignment?

A. Yes, sir.

Q. What is your answer?

A. Yes, sir.

Q. Do you exercise any option in this case to take bonds or cash?

A. Yes; the cash.

Q. Cash; now, after the death of Mr. Blees, did you make any effort to collect this policy?

A. Yes.

Q. In whose hands did you put it?

A. In our attorneys', Major Dysart and Mitchell.

Q. The law firm of Dysart & Mitchell?

A. The law firm of Dysart & Mitchell.

Q. Of Macon, Missouri?

A. Macon, Missouri.

Q. Did the defendant ever give you any blanks on which to make proofs of death?

A. Never.

Q. How is that?

A. No.

Q. Were you Mr. Blees' wife at that time?

A. Yes, sir.

Q. When were you married?

A. On December 7th, '86.

Q. I show you the policy in suit and I ask you to state whether or not the application for it is attached to it, endorsed on it, or set forth in it?

Mr. Holliday: I object to the witness testifying to that; the policy is there, has been offered in evidence, speaks for itself.

107 The Court: I understand this is a copy which is attached to the policy and made a part——

Mr. O'Donohoe: It is not attached to it or made a part of it in any way that we know of.

The Court: She may answer.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

Mr. O'Donohoe:

Q. What is your answer?

A. No, sir.

Q. Is there any loan agreement attached to it?

Mr. Holliday: I object to that for the same reason; the policy is in evidence and speaks for itself, and the second reason, it is utterly immaterial whether any copy of loan agreement, or loan agreement itself, is attached to the policy or not.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted, and still objects and excepts.

A. No, sir.

Mr. O'Donohoe:

Q. Any rules of the defendant company attached to it?
A. No, sir.

Mr. Holliday: I object to that for the same reasons.
The Court: She may answer.

Which objection was by the Court overruled; to which action and ruling of the Court the defendant, by its counsel then and
108 there duly objected and excepted, and still objects and excepts.

Mr. O'Donohoe:

Q. At the time this loan was made, did you have any children?
A. I had five.
Q. Of whom the insured was the father?
A. I didn't get your question.

Mr. O'Donohoe: Kindly read it.
Mr. Holliday: I object to that line of questions; it is utterly immaterial or irrelevant in this case whether the insured and Mrs. Liebing, then Mrs. Blees, had any children, or how many they had.
The Court: She may answer; I understand it is in the pleadings.

Which objection was by the Court overruled to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted, and still objects and excepts.

(Thereupon the reporter read the question as follows: Q. Of whom the insured was the father?)

A. Yes, sir.

Mr. O'Donohoe:

Q. Were they any minor children at that time?
A. They were all minors.

Mr. O'Donohoe: That's all, I believe.

Cross-examination.

By Mr. Holliday:

Q. Where are you living now, Mrs. Liebing?
A. Kansas City, Missouri, is my home.
Q. I understood you to testify in answer to questions of Mr. O'Donohoe's that the four premiums that were paid on this
109 policy were all paid at Macon, Missouri; did not you so answer?

A. Yes, I answered that; Mr. Blees paid the premiums himself.

Q. Well, now, isn't it the truth that the premium due on this policy September 29th, 1904, was taken out of the proceeds of this loan in New York?

A. No; Mr., we paid that to Mr. Payson.

Q. Do you want us to understand that you paid——

A. I was present when Mr. Payson handed Mr. Blees this check, and I was one of the parties agreeing to the loan; it was my property they was borrowing money on.

Q. I don't know whether you misunderstand me, Mrs. Liebing; I want to make myself perfectly clear to you; isn't it true that the premium due on this policy September 29th, 1904, was taken out of this loan in New York, and a check for the difference was sent to you and Mr. Blees?

A. A check for the difference was paid to Mr. Blees by Mr. Payson.

Q. Well, wasn't the premium due September 29th, 1904, paid out of that loan?

A. Yes, it was agreed by both Mr. Blees and myself and Mr. Payson, first the premium was to be paid, and a year's interest in advance on the loan.

Q. And that was done, wasn't it?

A. It was done; yes, sir.

Q. Out of the loan?

A. Yes sir.

Q. Mrs. Liebing, I will show you a paper which I will ask the stenographer to mark "Defendant's Exhibit A", and ask you whether the signature Frederick W. V. Blees, appearing on the back of the second sheet of that paper is the signature of your then husband, Mr. Blees?

A. You mean this right here?

Q. Yes.

A. Yes, sir.

Q. Now, underneath that?

A. D. H. Payson.

110 Q. That is Mr. Payson's signature?

A. Yes, sir.

Q. Were you present when that was signed?

A. I was in Mr. Payson's office at the time that he made this report, he applied for us, the loan; I was in the office with him.

Q. Now, you understand, Mrs. Liebing, this is not to confuse you; this has nothing to do with the loan?

A. No, I know that.

Q. The paper you have is the application for the policy; I just asked you whether you were present?

A. I couldn't say whether I was there at this one time or not.

Q. But you are certain the signature of your husband, Frederick W. V. Blees, as it appears there, is his signature?

A. Yes, sir.

Q. I will now show you a paper, Mrs. Liebing, which I will ask the stenographer to mark "Defendant's Exhibit B".

(Thereupon the reporter marked the same "Defendant's Exhibit B".)

Q. And ask you if the signature of Frederick W. V. Blees, Macon, Mo., is written on there by your husband?
A. Yes, sir.
Q. And opposite there is, Mr. Payson, is that Mr. Payson's signature?
A. Yes, sir.
Q. And underneath your husband's signature is Mary S. Blees, Macon, Mo.; is that your signature?
A. Yes, sir.
Q. And opposite is Eugene Lain; is that his signature?
A. Yes, sir.
Q. You signed that paper, you say, in the military academy?
A. Yes, sir.
Q. At Macon?
A. Yes, sir.
Q. And your husband signed it?
A. Yes, sir.
111 Q. Were you both there at the same time?
A. We were both there at the same time; we both signed it at once.
Q. He signed it first?
A. Yes.
Q. And then you signed it?
A. I signed it.
Q. Right in his presence?
A. Yes, sir.
Q. After it was signed it was given to Mr. Payson?
A. Yes, sir.
Q. Now, Mrs. Blees, I will show you a check, which I will ask the stenographer to mark "Defendant's Exhibit C."

(Thereupon the reporter marked the same "Defendant's Exhibit C.")

Q. On the back of this check appears the words, "Pay to the order of the National Bank of Commerce, St. Louis, Missouri, Frederick W. V. Blees"; is that in your husband's writing?
A. Yes, sir.
Q. And underneath that appears the signature Mary S. Blees; is that your signature?
A. Yes, sir.
Q. Mrs. Liebing, in what business was Colonel Blees engaged in Macon, from the year 1891 until 1901?
A. Well, he had several businesses there; he had the Blees Carriage Company, carriage business; he had the Macon Chair Factory and the Blees Military Academy.
Q. Those were all prosperous businesses, were they not, at that time?
A. In '91 are you speaking now?

Q. Well, between 1891 and 1901?
A. Well, yes, you might say they were prosperous.
Q. The military academy was quite a large school, was it not?
A. Yes; it wasn't built for a very large school.
Q. About how many pupils did you have there in 1901?
A. Well, I just couldn't tell you, Mr. Holliday, offhand;
112 I don't just, I don't remember just how many they had then, 1891.
Q. Well, do you think you can approximate it?
A. He generally had from 75 to 100, 125 boys there.
Q. And you husband was head of that school, was he not?
A. Yes, sir.
Q. Now, how large a plant was the carriage factory?
A. Well, I couldn't tell you very much about the carriage factory, Mr. Holliday; I didn't go into any details of Mr. Blees' business very much.
Q. I see; you had no, he was the head of that factory?
A. Yes, sir; I know he built it, he built it with his own money.
Q. And then I think you said there was a third industry he was engaged in?
A. There was a Macon Chair Factory; that never amounted to very much; he had a good deal of money in it but never got very much out of it.
Q. He was also interested in that business?
A. Yes, sir.
Q. Your husband was a highly educated man, was he not?
A. Yes, sir.
Q. And a man who had a good deal of business experience?
A. Yes.

Mr. Holliday: I think that's all.

Redirect examination.

By Mr. O'Donohoe:

Q. The signatures you have been asked about on plaintiff's, or rather Defendant's Exhibit C, where were they written on this exhibit; I mean, where were you and your husband at that time, when you wrote them?
A. At the academy; I lived at the academy at that time.
113 Q. Where was it located?
A. Beg pardon?
Q. Where was it located?
A. At Macon, Missouri.
Q. You testified that, that you had no notice of the time when this loan agreement, when this loan matured?
A. No.

Mr. Holliday: I object to that form of interrogating the witness, Mrs. Liebing is an intelligent witness.
The Court: She has already testified; he asked her if she had testified; she testified on direct——

Mr. O'Donohoe: Yes; I was just calling her attention to that; I want to ask another question, your Honor.

Q. If you had notice of the maturity of this loan, or premium, what would you have done?

Mr. Holliday: I object to that, your Honor; it is incompetent and immaterial in this case; the plaintiff's own petition in the case and reply admits that the premium due September 29th, 1905, was not paid, and that the loan was not paid; that is admitted in their pleadings in this case.

Mr. O'Donohoe: That is not the question we are asking, whether paid or not; we are asking whether any notice——

Mr. Holliday: There is no such issue framed under this voluminous reply of 29 pages Mr. O'Donohoe read here, there is absolutely not a word in his petition or reply about their being prejudiced on account of not receiving any notice.

Mr. O'Donohoe: The reply pleads affirmatively, your Honor, that there was no notice.

Mr. Holliday: I know, but you make no issue of it.

The Court: This policy, I understand, was issued to the husband?

Mr. Holliday: Issued to the husband.

114 The Court: And afterwards assigned to this plaintiff.

Mr. Holliday: Yes.

The Court: Did she join in making the loan?

Mr. Holliday: Yes, your Honor; she signed this loan agreement which was the Exhibit "B", I just had identified.

The Court: In view of that fact she may answer.

Which objection was by the Court overruled; to which action and ruling of the Court, defendant by its counsel then and there duly objected and excepted and still objects and excepts.

Mr. O'Donohoe: Will you read the question?

The Witness:

A. I didn't understand your question.

Mr. O'Donohoe: It will be read for you.

(Thereupon the reporter read the question, as follows: Q. If you had notice of the maturity of this loan, or premium, what would you have done?)

A. You mean that it was not paid?

Mr. O'Donohoe:

Q. If you had notice of the maturity of the loan and premium, what would you have done?

A. Why, I would have tried to have seen why Mr. Blees didn't lok after it, and if he didn't look after it I would have looked after it myself.

Mr. Holliday: I move that the answer of the witness be stricken out.

The Court: It may stand.

Mr. Holliday: For all the reasons given for the objection to the question.

The Court: It may stand.

Which objection was by the Court overruled; to which
115 action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

Mr. O'Donohoe:

Q. Now, were you financially able to look after this premium, loan and interest on it?

A. You mean——

Mr. Holliday: I object to that question; it is incompetent, irrelevant and immaterial under any of the issues framed in this case.

The Court: She may answer.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

The witness:

A. Do you mean was I personally financially——

Q. Yes.

A. Yes, sir; I had property in my own right.

Mr. Holliday: I ask that the answer of the witness be stricken out for the same reason—Mr. O'Donohoe, kindly permit me to make my objections.

Mr. O'Donohoe: Go ahead; take an hour.

Mr. Holliday: I object to that statement in the presence of the jury, and ask that counsel be reprimanded for making it.

The Court: What was that? I didn't——

Mr. Holliday: He said take an hour.

Mr. O'Donohoe: He wants to make an objection; I told him to take an hour.

The Court: Oh, that's all right; those side remarks won't prejudice the jury, I don't think.

116 The Court: What was the objection; you were asking to strike out——

Mr. Holliday: I asked that the answer of the witness to that question be stricken out for the same reason given to the objections to the question.

The Court: The answer may stand.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and stil objects and excepts.

Mr. O'Donohoe:

Q. I ask you to call off the property you had at that time?

Mr. Holliday: Same objection.

The Witness:

A. I don't just understand that, Mr. O'Donohoe; how much I had, or what I had?

Mr. O'Donohoe:

Q. Yes, name it.
A. Well, I owned considerable property at that time; I owned all the best corners in Macon, Missouri, at that time myself; I had a 780-acre farm out there; I owned nearly two-thirds of the carriage factory stock at that time, having let Mr. Blees have other moneys—
Q. How is that?
A. Having let Mr. Blees have other moneys, I took the carriage stock in——

Mr. O'Donohoe: That's all.
Mr. Holliday: Now, I move that that answer be stricken out for the same reasons that were given in the objection to the question.
The Court: Same ruling.

Which objection was by the Court overruled; to which action and ruling of the Court the defendant, by its counsel then and
117 there duly objected and excepted, and still objects and excepts.

Recross-examination.

By Mr. Holliday:

Q. Now, Mrs. Liebing, then apparently from your testimony you had some business transactions yourself?
A. Yes, sir: I had my own business entirely separate from Colonel Blees.
Q. I see; and in 1904, then, you were familiar with business transactions and had carried some out?
A. Yes, sir.
Q. You had property of your own?
A. Yes.
Q. And you had dealings with your husband?
A. Yes.
Q. I see.
A. I had furnished my husband quite a lot of money to help him carry his enterprises through.

Mr. Holliday: That's all.

Mr. O'Donohoe: That's all.

W. R. COMPTON, being first duly sworn by the clerk to tell the truth, the whole truth and nothing but the truth, testified on behalf of the plaintiff, as follows:

Direct examination.

By Mr. O'Donohoe:

Q. What is your name?
A. W. R. Compton.
Q. And your business?
A. I am an investment banker.
Q. Did you know Frederick W. V. Blees in his lifetime?
A. Yes, sir.
Q. Do you know the plaintiff, Mrs. Liebing?
A. I do.
118 Q. Were you one of the administrators of his estate?
A. I was.
Q. I show you certain documents, among which is claimant's certificate, attending physician's certificate, friend's certificate, and admission of the will of Frederick W. V. Blees to probate in the Probate Court of Macon County, Missouri, all of which I shall ask to be marked "Plaintiff's Exhibit 5."

(Thereupon, the reporter marked the same "Plaintiff's Exhibit 5.")

Q. After those were prepared, or, I will ask you first, were those prepared by yourself and your co-administrator, Doctor Clements?
A. They were prepared for us.
Q. Yes, what was the occasion——
A. By our attorney.
Q. What was the occasion of preparing those, Mr. Compton?
A. In order that we might take charge of the estate legally. I presume, as administrators, or, you are referring to those——
Q. Yes, proofs of death.
A. Oh, the proofs of death; yes, oh, pardon me; why, for the purpose of making claim on life insurance policy in the Mutual Life Insurance Company of New York, issued in the name of Frederick W. Blees.
Q. Well, after those were prepared, Mr. Compton, did you turn them over to the Mutual Life?

Mr. Holliday: Now, if your Honor please, I object to any further testimony regarding the exhibit which the witness holds in his hand: it refers to an entirely different policy from the policy in suit; has nothing to do with the policy in this case.

The Court: I don't know, of course, what the papers are yet; he may testify.

119 Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

Mr. O'Donohoe:

Q. What is your answer, Mr. Compton?
A. Yes, sir; to the best of my knowledge and belief.
Q. When would you say you delivered them to the defendant, the Mutual Life?
A. Very shortly after the date here, October 8th, 1906.
Q. If the insured died on the 8th day of September, 1906, would you say that you had furnished them to the defendant within ninety days after his death?
A. Yes, sir.

Mr. Holliday: Objected to as leading and calling for a conclusion.
The Court: He has already answered yes.

Mr. O'Donohoe:

Q. Is your answer yes?
A. Yes, sir.
Q. Did you and your co-administrator collect any policy on the life of Blees from the Mutual Life?
A. My mind is a little hazy, but I am sure we did.
Q. At any rate you do know that you furnished these proofs?
A. Yes, sir.
Q. Which are marked "Plaintiff's Exhibit 5?"

Mr. O'Donohoe: That's all.

Cross-examination.

By Mr. Holliday:

Q. Now, Mr. Compton, I will ask you to examine again this document, Plaintiff's Exhibit 5, that Mr. O'Donohoe handed you, and ask you to state from there to what number of policy, what the number of the policy was in the Mutual Life to which those proofs
120 refer?
A. Numbers 698,307.
Q. And what was the amount of that policy?
A. Five thousand dollars.
Q. And to whom was the policy payable?
A. Where do you find that? Oh, that is claimant's name there, that is the claimant's name; you asked who the policy was payable to.
Q. In what capacity did you make the claim?
A. You didn't ask that question; you asked who it was payable to.
Q. That is what I mean to refer to; I will produce the original policy if you would like to refresh your recollection of that.
Q. I show you this policy number 698,307, for $5,000, and ask you to state if that is the policy on which you are making these proofs of death; and if so, to whom it was payable?
A. That was the policy, and it is made payable to *to* executors, administrators or assigns of Frederick W. V. Bless.

Q. And you received from the company the $5,000 on that policy, did you not?
A. Yes, sir.
Q. Mr. Compton, how long did you know Mr. Bless?
A. I should think fifteen years.
Q. Ever since you were living in Macon, in 1891?
A. Yes, sir.
Q. When Colonel Bless came there?
A. Yes, sir; it wasn't that long; it was from that date to the day of his death.
Q. He continued to reside there for the next fifteen years?
A. Yes, sir.
Q. Died 1906?
A. Yes.
Q. From your acquaintance with Colonel Blees, will you state whether, in your opinion, he was an educated man?
A. Yes, sir; he was an educated man.
121 Q. A man of refinement?
A. A man of refinement; yes, sir.
Q. And a man of business experience?
A. No, sir.
Q. Had no business experience; he had a military academy there, did he not?
A. Yes, sir.
Q. And he was head of that academy?
A. Yes, sir.

Mr. Holliday: I think that's all.
Mr. O'Donohoe: That's all, Mr. Compton.
The Court: That's all, Mr. Compton.
Mr. Holliday: Just a minute, Mr. Compton; I will ask you one more question.

Q. Did you ever see this policy that is here in suit, numbered 1,207,072?
A. Yes, sir; I am quite sure I saw that.
Q. Saw that in Macon?
A. Yes, sir.

Mr. Holliday: That's all.
Mr. O'Donohoe: That's all.

JOHN B. DEMPSEY, being first duly sworn by the clerk to tell the truth, the whole truth and nothing but the truth, testified on behalf of the plaintiff, as follows:

Direct examination.

By Mr. O'Donohoe:

Q. What is your name?
A. John B. Dempsey.
Q. What is your profession?

A. Lawyer.
Q. How long?
A. Thirty years.
Q. Have you had any suits on policies of insurance?
A. A great many of them.
Q. Do you feel that you would be able to testify to what a reasonble attorney's fee would be in an action brought on a policy of inurance?
A. I think so.

22 Mr. Holliday: Now, if your Honor please, at this point I wish to object to the introduction of any evidence as to the value of attorney's services in this case; first, because it is obious from the state of the record and evidence here that there is no vidence of vexatious refusal to pay on this policy, or nothing on hich a claim for damages or attorney's fees can be based; second, or the reason that the right to submit that question to the jury, or iability for damages or attorney's fees, is a penalty created by statte, and therefore barred in three years; that if any cause of action rose at all here it was in 1906, on the date after, following, the death f the insured, but that the plaintiff did not even file suit in this case or six years until 1912, and therefore the right to make any such laim would be barred even if there were any grounds for sustainag it.

The Court: Wasn't that question put directly up to the Supreme ourt on the first appeal?

Mr. Holliday: No, your Honor, that point was not raised on the rst appeal, because the suit went off on nonsuit. The point your Ionor has in mind there was made was that the whole suit was on a ability created by statute and barred in five years.

Mr. O'Donohoe: If the Court please, that question, the question f limitations, of course, is not an issuable fact here, since there is no uch plea in the answer. The limitation question is always an afrmative defense and to be available must be set up in the answer.

The Court: Objection overruled.

23 Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and xcepts.

Mr. O'Donohoe:

Q. Mr. Dempsey, I will ask you to state what is a reasonable atorney's fee, assuming the facts to be as follows: Policy issued on the 9th day of September, 1901, in consideration of an annual premium f $4,291.50; by the terms of the policy at its maturity the insurer greed to deliver to the beneficiary or his assignees fifty gold bonds, ach of the denomination of $1,000, or to pay in cash the sum of 65,250, at the option of the beneficiary or assignee; premiums were aid on the policy for four years, but there was no premium paid hereafter, and at the date of lapse, which was September 29th, 1905, he policy, under the laws of the State of Missouri, had acquired a

net value of $11,230.83; about the 12th day of October, 1904, the insured, together with the assignee of the policy, applied to the insurer for a loan of $9,550, which was granted; proceeds of the loan were distributed as follows; $4,291.50 was applied to pay the annual premium due the 29th day of September, 1904; $468 was applied to pay interest on the loan and premium, and $4,790.50 was given outright to the insured and assignee of the policy; as stated, no premium was ever paid on the policy after the 29th day of September, 1905; the insured died on the 8th day of September, 1906, and, as stated, at date of lapse, September 29th, 1905, the policy had acquired a net value under the non-forfeiture laws of the State of Missouri of $11,230.83, and three-fourths of that sum is $8,423.12; now, if the entire loan of $9,550 is deductible from three-
124 fourths of the net value, then there is no part thereof left to purchase temporary insurance, and if only so much of said loan as is applied to payment of premium and interest, namely, $4,759.50, is deductible, then there is left sufficient of said three-fourths of said net value to purchase temporary extended insurance beyond the death of the insured under the laws of the State of Missouri. Plaintiff, who was the assignee, filed a petition in the Circuit Court of the City of St. Louis, Missouri, December 9th, 1912; the defendant filed an answer, and afterwards filed an amended answer, in which it set up five affirmative defenses. The first affirmative defense was that there was a default in the payment of the loan of $9,550, and that the defendant had a right to and did appropriate and apply the cash surrender value of the policy to repay the loan; the second affirmative defense was that there was a default in the payment of the annual premium due the 29th day of September, 1905; that payment of the loan was a condition of the insurance provided for in the policy, and that the failure of the insured to repay the loan was a violation of said condition, and that therefore the defendant was not bound to pay the amount of the policy under Section 6948 of the Revised Statutes of Missouri, 1909; that the policy thereby lapsed and the insurance was canceled, and defendant was without liability under it; the third affirmative defense was that the Amendatory Act of 1903, Laws 1903, page 208, was applicable, although the policy was issued before the Amendatory Act was passed, because neither the insured nor the plaintiff were entitled to a loan on the policy until the same should have been in force three
125 full years, and that no right to extended insurance vested in the insured or his beneficiaries, or his assignees, until that time; that to require the defendant to pay the policy would deny to the defendant due process of law and the equal protection of the law, in violation of Section 1, Article XIV of the Constitution of the United States, and Section 30 of Article II of the Constitution of the State of Missouri; the fourth affirmative defense was that Section 7899 of the Revised Statutes of Missouri, 1899, required plaintiff to submit to the defendant, notice of claim and proofs of the death of the insured in the same manner as provided by the terms of the policy, within ninety days after the death of the insured, that the plaintiff had failed to do so, and that, therefore, no right to extended

insurance accrued to her, and plaintiff was barred from asserting such right; the fifth affirmative defense was a plea of the statute of limitations, to the effect that since suit was brought more than five years after the death of the insured the action was barred. There was a trial in the Circuit Court, resulting in plaintiff's being nonsuited, and her petition dismissed, from which she appealed to the Supreme Court; the case was heard in the Supreme Court and reversed and remanded. After the case had been remanded to the Circuit Court, plaintiff filed a first and second amended petition, which you are not to take into consideration in estimating the amount of the attorney's fees; to this second amended petition, which you are not to take into consideration in estimating the amount of attorney's fees, defendant filed an answer, which omits the defense of want of notice and want of proofs of death, and omits also
126 the defense of the statute of limitations, but pleads a new defense, that is, it invokes the laws of the State of New York and claims they are the applicatory laws, and claims, furthermore, that to deny the defendant the benefit of the New York laws would be violative of the Federal Constitution. To that amended answer plaintiff filed a reply, which consists of a general denial, plea of res adjudicata, and affirmatively states that the New York laws are inapplicable, and are waived, as well as that the Federal Constitution is inapplicable, and was waived, because the defendant did not invoke them timely in its pleadings. From the second verdict and judgment the defendant appealed to the Supreme Court, where the case was argued in division, and also en banc. The Supreme Court reversed and remanded the case, and thereafter the plaintiff filed an amended reply, in which she averred in addition to that alleged in her former reply, that the making of the loan was an act beyond the scope of the defendant's charter, was ultra vires and void. She also invokes therein certain statutes and decisions of the State of New York in avoidance of the defensive matters set up in defendant's answer, and intended to establish the right in plaintiff to recover in this case under said New York statutes and laws. Defendant filed a motion to strike out part of plaintiff's amended reply, which motion was argued and thereafter overruled. The bill of exceptions on the first appeal, which I hand you, consists of 58 pages, and the bill of exceptions on the second appeal consists of 102 pages. Depositions on the part of defendant were taken in the City of New York. The first set consists of twenty-four pages, which I also hand you;
127 the second consists of thirty-two pages. The plaintiff was not represented at the taking of the first depositions, but was represented at the taking of the second depositions in the City of New York. Plaintiff gave notice to defendant to take depositions in the City of New York, and after the taking of same had progressed for a while counsel for the respective parties to this proceeding entered into a stipulation which embodies the facts sought to be established by said depositions. This stipulation consists of a little over five pages, which I also hand you. On the first appeal plaintiff filed a motion of five pages to advance in the Supreme Court; the defendant filed a reply thereto of nearly two pages. These motions, together

with the abstracts of the records, briefs, reply briefs and motions for rehearing, consist of 832 pages; here they are. What is your answer?

Mr. Holliday: Now, just a minute; is that the end of your question?

Mr. O'Donohoe: Yes.

Mr. Holliday: I object to that question, not only for the general grounds already given, that there is no proper case here for the introduction of any testimony as to the value of attorneys' fees, and because it is a penalty created by statute; but I certainly object to that question as absolutely improper in form, from any point of view as a hypothetical question; also assuming facts not proved in evidence, and being an erroneous and misleading statement of the facts in this case.

The Court: In what respect does the hypothetical question fail to embody all the facts?

Mr. Holliday: It fails to embody the testimony which was presented at the other trial, showing what took place between
128 representatives of Mrs. Liebing and the company before any suit was filed; also fails to take into consideration the fact that after two of Mrs. Liebing's counsel were satisfied that there was no liability on this policy she waited six years before filing this suit.

Mr. O'Donohoe: There isn't any evidence of that at all, your Honor.

Mr. Holliday: That is in evidence; is in the record in this case; and for those reasons and because this question is certainly improper in form and certainly assumes facts which have not been proved in this case at this trial, I object to it specifically.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

The Witness: I don't know the amount which you are seeking to recover from the statement you have made.

Mr. O'Donohoe:

Q. The amount of the policy, that is true, I omitted that; the amount of the policy originally was $65,200, that is, it was fifty—I think the question embodies that—fifty bonds, each of the denomination of one thousand dollars, or, at the option of the beneficiary or assignee, it was $65,250; there was a loan on the policy reducing it somewhere to $52,000, and there is accrued interest on that since 1906, I think we say November 20th, 1906, the date the defendant disclaimed liability under the policy.

Mr. Holliday: I again object to this additional question for the same reasons.

129 Mr. O'Donohoe:

Q. Approximately $92,000, principal and interest.

The Court: Same ruling.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

A. I would say that the value of the attorney's services in that case would be $25,000.
Q. What?
A. Twenty-five thousand.

Mr. O'Donohoe: That's all.

Cross-examination.

By Mr. Holliday:

Q. What would be your opinion, Mr. Dempsey, on the right of the attorney, right of attorney, getting an attorney's fee in a case of this kind, if you knew he had a fifty per cent contract with his client, to get fifty per cent of any amount recovered?
A. It wouldn't alter my opinion as to the value of the services; the value of the services would still remain the same.

Mr. Holliday: That's all.
Mr. O'Donohoe: That's all.

FREDERICK H. BACON, being first duly sworn by the clerk to tell the truth, the whole truth and nothing but the truth, testified on behalf of the plaintiff, as follows:

Direct examination.

By Mr. O'Donohoe:

Q. What is your name?
A. Frederick H. Bacon.
Q. What is you- vocation, Mr. Bacon?
A. Lawyer.
130 Q. How long have you been such?
A. Forty-eight years.
Q. Also an author on the law of insurance and benefit societies?
A. Yes.
Q. Your work is in the fourth edition?
A. Yes.
Q. You know this case, in a general way?
A. After a fashion, yes.
Q. And you heard the question I read for Mr. Dempsey?
A. Yes.

Q. What would you say, Mr. Bacon, in view of the facts embodied in the question, and your general knowledge, what would you say would be a reasonable attorney's fee?

Mr. Holliday: Just a moment, Mr. Bacon. I wish to be understood, your Honor, of course I continue to object to the introduction of any of this testimony; then I also object to this witness attempting to answer the same question put to Mr. Dempsey, for the same reason I urged objection to that question, improperly formed and based on assumptions not proved.

The Court: Same ruling.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

A. I should say under the circumstances, considering this case, the difficult propositions involved, that the services were worth anywhere from fifteen to twenty-five thousand dollars.

Mr. O'Donohoe: That's all.

131 Cross-examination.

By Mr. Holliday:

Q. Mr. Bacon, have you and Mr. O'Donohoe conferred about this case from time to time as it has gone on?

A. Well, I can't say that we have conferred, but I have taken watched the case because of the propositions involved, and——

Q. And you have discussed it with him several times?

A. Well, not discussed it; he has spoken about the case several times, and so I have to him, inquired about it, how it was getting along, and I have followed it; it is a very interesting case, as you know.

Q. I think you are right.

Mr. Holliday: That's all.

Mr. O'Donohoe: That's all, Mr. Bacon.

Louis H. Brunswick, being first duly sworn by the clerk to tell the truth, the whole truth and nothing but the truth, testified on behalf of the plaintiff as follows:

Direct examination.

By Mr. O'Donohoe:

Q. What is your name?

A. Louis H. Brunswick.

Q. And your business?

A. Connected with the National Bank of Commerce.

Q. Have you any books showing deposits made by Mr. Blees, Frederick W. V. Blees, in your bank in 1904?

A. No, sir.
Q. What became of those books?
A. Those books were sold to the Paper Stock Company, the Federal Paper Stock Company, I think the name is.

Mr. O'Donohoe: That's all.
Mr. Holliday: That's all.

132 EDGAR G. NIGGEMAN, being first duly sworn by the clerk to tell the truth the whole truth and nothing but the truth, testified on behalf of the plaintiff, as follows:

Direct examination.

By Mr. O'Donohoe:

Q. What is your name?
A. Edgar G. Niggeman.
Q. What is your business?
A. Connected with the National Bank of Commerce.

The Court:

Q. What is your name?
A. Niggeman.

Mr. O'Donohoe:

Q. Do you know whether or not the National Bank of Commerce has any books or records showing deposits by customers in the year 1904?
A. No, sir; we have not; they were all destroyed.
Q. Sir?
A. They were all destroyed.

Mr. O'Donohoe: That's all.

Cross-examination.

By Mr. Holliday:

Q. I show you a check which has been heretofore identified as Defendant's Exhibit "C" in this case, and I see on the back of that a stamp, Merchants Exchange National Bank, New York City, pay blank or order, October 18, 1904. National Bank of Commerce in St. Louis, J. A. Lewis, Cashier; could you state from your knowledge of affairs at the bank whether that is the stamp of your bank that is on there?
A. Yes, sir.
Q. I also call your attention, there is another stamp on the back of this check, Received payment through New York Clearing House, October 19, 1904, Merchants Exchange National
133 Bank off the City of New York, Note Teller; I will ask you

whether that stamp shows that the check was paid in New York?

A. Yes, sir, it was.

Mr. Holliday: That's all.
Mr. O'Donohoe: That's all.

JOHN C. LEE, being first duly sworn by the clerk to tell the truth, the whole truth and nothing *by* the truth, testified on behalf of the plaintiff, as follows:

Direct examination.

By Mr. O'Donohoe:

Q. What is your name?
A. John C. Lee.
Q. What is your business?
A. Life insurance.
Q. How long have you been in business, life insurance business?
A. Fifty years.
Q. How many?
A. Fifty.
Q. What company are you now with?
A. Mutual of New York.
Q. How long have you been employed there?
A. Fifty years.
Q. What territory does the St. Louis district embody?
A. Part of Missouri and a small part of Illinois at this time.
Q. Well, in 1901, 2 and 3, 4, 5, did the St. Louis district embody Macon, Missouri?
A. Yes, sir.
Q. Applications made in Macon, Missouri, for policies of insurance, would they come through the St. Louis district?
A. Yes, sir.

Mr. Holliday: That is objected to; just a moment, Mr. Lee, please; that is objected to as incompetent, irrelevant and im-
134 material to any of the issues in this case.

The Court: The same objection, general objection made throughout; overruled.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

Mr. O'Donohoe:

Q. Do you recall whether or not the application for the policy in this suit came through the St. Louis office?

Mr. Holliday: That is also objected to as incompetent, irrelevant and immaterial.

The Court: Same ruling.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

A. I may answer? Why, as a general proposition, all applications came through, I would say yes; but this particular one I don't remember.

Mr. O'Donohoe:

Q. Do you know Payson of Macon, Missouri?
A. Yes, sir.
Q. Dwight H. Payson?
A. Yes, sir.
Q. He was the Macon agent, was he?
A. Yes, sir.
Q. In 1901, '02, '03 and '04?
A. Yes, sir.
Q. And he sent his applications to the St. Louis office?
A. Yes, sir.
Q. And then the St. Louis office sent them to the home office?
A. Yes, sir.
Q. Then, where would policies for Macon come from?

Mr. Holliday: That is objected to for the same reason: incompetent, irrelevant and immaterial to the issues in this case.
135 The Court: Same ruling. You may answer.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

A. The policy would be sent from the New York office to this agency.
Q. What agency?
A. St. Louis agency.
Q. What, then, would the St. Louis agency do with the policy?
A. Make a record and forward it to the agent entitled to receive it.
Q. Well, Payson—would you say that Payson, the regular agent at Macon, would be entitled to receive it?
A. Yes, sir.

Mr. O'Donohoe: That's all.
Mr. Holliday: That's all.

Thereupon the Court took a recess until 3:59 o'clock p. m. of the same day, May 12th, 1919; at which day and hour court was duly reconvened, and, the jury being present as before, the following proceedings were had, to wit:

Mr. O'Donohoe: If the Court please, and gentlemen, I offer in evidence now Plaintiff's Exhibit 4. This exhibit, gentlemen, reads as follows: "For one dollar, to me in hand paid, and for other valuable considerations, the receipt of which is hereby acknowledged,

I hereby assign, transfer and set over to Mary S. Blees, my wife, whose post-office address is Macon, Missouri, all my right, title
136 and interest in this policy number 1,207,072, issued by the Mutual Life Insurance Company of New York, and for the consideration above expressed I do also for myself, my executors and administrators, guarantee the validity and sufficiency of the foregoing assignment to the above-named assignee, her executors, administrators and assigns, and their title to the said policy will forever warrant and defend. Dated in Macon, Missouri, this 2nd day of March, 1904. In the presence of R. W. Frey. Frederick W. V. Blees."

Mr. O'Donohoe: Exhibit 5 I offer in evidence.

Mr. Holliday: I object to the offer of that exhibit in evidence, your Honor, on the ground it is shown from the testimony of Mr. Compton, who identified the exhibit; it has nothing to do with the policy in suit; it is on an entirely different policy, which was paid to the administrators and executors of Colonel Blees, and has nothing whatever to do with the policy sued on.

The Court: What is the purpose?

Mr. O'Donohoe: This exhibit, your Honor, is offered in evidence for the purpose of showing a compliance with the conditions precedent in the policy requiring proofs of death; it has been held by the Supreme Court of Missouri that furnishing proofs of death under one policy dispenses with proofs of death on another policy on the same life.

The Court: I understand, where they have been informed of the death.

Mr. O'Donohoe: Yes, sir.

The Court: It may be admitted for that purpose.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there
137 duly objected and excepted and still objects and excepts.

PLAINTIFF'S EXHIBIT 5.

In the Probate Court of Macon County, Missouri, 1906, August Adjourned Term, September 15th, 1906.

In the Matter of the Estate of FREDERICK W. BLEES, Deceased.

Will Probated.

Now at this day comes on to be heard the matter of the probating on an instrument of writing filed in this court purporting to be the last will and testament of Frederick W. Blees, deceased, and signed by said Frederick W. Blees, deceased, and B. R. Dysart and Jno. Scovern, as attesting witnesses, and dated November 20th, 1895.

And the matter being at issue the Court hears and examines same and hears the evidence of B. R. Dysart and Jno. Scovern, subscribing witneses to said will and reduces the same to writing, and

finds that said Frederick W. Blees died a resident of Macon County, Missouri, on the 8th day of September, 1906; that said Frederick W. Blees signed said instrument of writing in the presence of B. R. Dysart and Jno. Scovern and published and declared the same to be his last will and testament; and said B. R. Dysart and Jno. Scovern signed said instrument of writing in the presence of Frederick W. Blees, deceased, and at his request and in the presence of each other; that at the time of signing same said Frederick W. Blees was of sound and disposing mind and memory and over twenty-one years of age.

138 And the Court being of the opinion that said instrument of writing is the last will and testament of Frederick W. Blees, deceased, and that the same was duly executed and witnessed, it is therefore ordered and adjudged by the Court that said instrument of writing is the last will and testament of Frederick W. Blees, deceased, and the same is therefore admitted to probate as such.

In the Matter of the Estate of FREDERICK W. BLEES, Deceased.

Now at this day comes Mary S. Blees and shows the Court that by the terms of the last will and testament of Frederick W. Blees, deceased, she is made the executrix thereof; and she hereby presents her waiver in writing declining to act as such executrix and asking the Court to appoint Ed B. Clements and William R. Compton as administrators with the will annexed of Frederick W. Blees, deceased.

In the Matter of the Estate of FREDERICK W. BLEES, Deceased.

Now at this day comes Ed B. Clements and William R. Compton and by their application show the Court that Frederick W. Blees departed this life September 8th, 1906, a resident of Macon County, Missouri; leaving as his heirs the following, to wit: Mary S. Blees, widow; Frederick W. Blees, Alvin W. Blees, William A. Blees, Maria A. Blees and Mary Elizabeth Blees, children; that said deceased left some property requiring the services of an administrator; that by the terms of the last will and testament of Frederick W. Blees, deceased, Mary S. Blees is made the executrix thereof; that

139 said executrix declined to serve as such, and asked the Court to appoint Ed B. Clements and William R. Compton as administrators with the will annexed of Frederick W. Blees, deceased; and they hereby tender their oath to make true administration and to fully carry out all the provisions of the will of said deceased, and they ask that they be appointed.

And the Court hears said application and Ed B. Clements and William R. Compton are hereby appointed as administrators with the will annexed of Frederick W. V. Blees, deceased, and ordered to give bond in the sum of fifty thousand dollars.

In the Matter of the Estate of FREDERICK W. BLEES, Deceased.

Now at this day comes Ed B. Clements and William R. Compton, administrators with the will annexed of Frederick W. Blees, deceased, and as such present their bond in the sum of fifty thousand dollars, with the United States Fidelity and Guaranty Company of Baltimore, Maryland, as security, signed by C. H. Payson, general agent, and R. S. Matthews, attorney.

And the same is by the Court examined, approved and letters issued.

Certificate.

STATE OF MISSOURI,
County of Macon, ss:

I, C. G. Buster, Judge and ex officio Clerk of the Probate Court of Macon County, Missouri, hereby certify the above and foregoing to be a full, true and complete copy of the record, of the pro-
140 bating of the will of Frederick W. Blees, deceased, the declining of Mary S. Blees to act as executrix; and the application of Ed B. Clements and William R. Compton to be appointed administrators with the will annexed and the giving of bond and the issuing of letters to them as such administrators, as the same appears of record in the office of the clerk of said court.

Witness my hand and the seal of this Court this 8th day of October, 1906.

[SEAL.]

C. G. BUSTER,
Judge and ex Officio Clerk.

The Mutual Life Insurance Company of New York.

Richard A. McCurdy, President.

Instructions.

1. Each certificate must be sworn to before an officer duly authorized to administer oaths; and his authority and the genuineness of his signature must be attested by the clerk of a court of records.

2. If the oath is administered in a foreign country the official character of the person administering the same, or of the clerk or other officer of the court certifying thereto, must be authenticated by a Consul or Minister of the United States residing in such foreign country.

3. The undertaker's certificate must be executed by the undertaker or sexton who interred the deceased. If impossible to obtain the undertaker's certificate, the clergyman who officiated may certify to the interment.

4. The claimant's certificate must be executed by the person
141 legally entitled to receive the money, who must state in what capacity he or she makes the claim, whether as executor, administrator, guardian, trustee, assignee, beneficiary named in the policy, attorney or other legal representative. All authority derived from a court must be accompanied by a certificate of appointment duly authenticated. In case of claim under assignment, a sworn statement of assignee's insurable interest must be furnished with the assignment. Trustees, unless named in the policy, must exhibit their authority.

5. The attending physician's certificate must be executed by the physician attending the deceased in his or her last illness. If more than one physician were employed the certificate of each must be obtained. The entire certificate must be in the handwriting of the certifying physician.

6. The friend's certificate must be executed by some responsible householder acquainted with the deceased, cognizant of his or her death, and not interested in the claim.

7. In cases of death from other than natural causes, or where a Coroner's or other official inquiry has been made, a certified copy of all the evidence and of the verdict found will be required.

8. Every question must be distinctly and fully answered. The Company reserves the right to require further information should it be deemed necessary.

9. By carefully observing, before proofs are forwarded, that all blanks are properly filled, and every question fully answered, prompt action upon the claim may be secured. Agents will greatly facilitate settlement of claims if they will invariably inform the Home
142 Office if the premiums have been paid up to or beyond the date of death.

10. The intervention of brokers or commission men is unnecessary in the collection of claims by death from this company. All proofs of death should be forwarded to our duly authorized agents, through whom the claims will be collected without expense, or sent direct to the Company's office, where payment will be made on approved claims without charge.

11. Claims are payable only at the Company's office in New York City, when due, on return of the policies and receipt properly signed.

No. 1.

Undertaker's Certificate.

1. Your name, residence, and post office address: Theo. Reichel.

2. Name of the deceased: Frederick Wm. Blees.

3. Date of birth (this blank to be filled, if possible, from the family record): Mch. 30, 1860.

4. Residence and occupation: Macon; school teacher and capitalist.

5. (*a*) Give the height: 5 ft. 8 inch; (*b*) apparent weight: 135 lbs.; (*c*) color of hair and eyes: Gray; (*d*) race or nationality: German.

6. Date and place of birth: St. Louis, Mo., Sept. 8, 1906.

7. Did you inter or prepare for burial the deceased? When and where, or what other disposition was made of the remains: Yes; in vault; Oakwood Cemetery.

8. Do you know this body to be that of the person described in the accompanying statement of the claimant in this case beyond a doubt: Yes.

(Signed) THEO. REICHEL.

143 *Oath.*

STATE OF MISSOURI,
County of Macon, ss:

On this 8th day of October, A. D. 1906, personally appeared before me the above named Theo. Reichel, and made oath that the answers by him above made and subscribed, are true and full, to the best of his knowledge and belief.

WALTER T. DUNAWAY,
Notary Public.

My term expires June 9, 1909.

For the agent:

Premiums on policy No. 698,307 are paid to June 1, 1907.
J. C. L.

No. 2.

The Mutual Life Insurance Company of New York.

Claimant's Certificate.

To Be Made by the Person Claiming the Insurance.

1. Number, date and amount of the policy; No. 698,307; $5,000.00.

2. Claimant's name and residence: Ed B. Clements and Wm. R. Compton, Admrs., Macon, Mo.

3. (*a*) In what capacity, or by what title, did you make the claim: Administrators.

(*b*) Are you legally entitled to receive the entire amount payable on the policy: Yes.

(*c*) If not how much of the amount: All.

4. Name of the deceased in full: Frederick Wm. Blees.

144 5. Place and date of birth of the deceased: Aachen, Germany; Mch. 30, 1860.

6. From whence is date of birth derived? From family record, certificate of birth or otherwise: From family record.

7. Place and date of death of the deceased: St. Louis; Sept. 8th, 1906; Missouri.

8. Residence of the deceased since the above policy was issued: Macon, Mo.

9. The several occupations of the deceased since the above policy was issued: School teacher and capitalist.

10. How long had you known deceased: 10 years.

11. (*a*) When did the health of deceased first begin to be affected?

(*b*) Duration of last illness: See Coroner's certificate.

(*c*) Immediate cause of death: Heart disease.

(*d*) Give every particular in relation to the last illness within your knowledge?

12. Name and residence of every physician who attended or prescribed for the deceased during the last year prior to death, or since his health began to fail: None.

13. In case there has been a Coroner's inquest furnish the company with a certified copy of the verdict of the jury, and all the evidence on which such verdict was based: Enclosed certificate.

14. Had the deceased any other insurance on his life? If so state in what companies, for what amounts, and the dates of the policies, respectively: N. Y. Life, No. 25,000, Mch. 1st, 1905, $10,000.00, 1895; State Mutual Life of Worcester, $25,000.00, 1905.

145 15. (*a*) Through and by whom was the last premium paid: St. Louis office, by F. W. Blees.

(*b*) And when: Don't know.

(Signed) ED B. CLEMENTS,
(Signed) WM. R. COMPTON,
Admrs. Estate Frederick W. Blees.

Oath.

STATE OF MISSOURI,
County of Macon, ss:

On this 6th day of October, A. D. 1906, personally appeared before me the above named Ed B. Clements and Wm. R. Compton,

and made oath that the answers by them above made and subscribed are true and full to the best of their knowledge and belief.

WALTER T. DUNAWAY,
Notary Public.

My commission expires June 9, 1909.

No. 3.

Attending Physician's Certificate.

All answers must be in the physician's handwriting.

1. (*a*) Where did you receive your medical education: Howard Med. Col., Washington, D. C.

(*b*) What is the date of your graduation: 1881.

2. Name of the deceased: Frederick Wm. Blees.

3. How long had you known the deceased: 10 years.

4. (*a*) What have been his several occupations: School teacher and capitalist.

(*b*) His places of residence: Macon, Mo.

5. State the apparent age of the deceased: 46.

6. (*a*) How long have you been his usual medical adviser: 10 years.

146 (*b*) Were you his attendant physician during his last illness: No.

7. (*a*) Were you his medical attendant or adviser before his last illness: Had no recent illness.

(*b*) If so, for what disease and when?

8. When did he show the first symptoms of his final illness: None.

9. Date of your first visit, or prescription in last illness: None.

10. Date of your last visit: None.

11. Place and date of death: St. Louis, Mo.; Sept. 8th, 1906.

12. (*a*) State the disease of which the deceased died, and give the date of origin, history and symptoms present during its progress: See Coroner's certificate enclosed.

(*b*) Was it complicated with any other disease, acute or chronic? If so, by what disease and how long: No.

(*c*) If from any cause other than disease, state the medical and other facts connected therewith: No.

(*d*) Was a post mortem examination made: by whom, and with what results: Yes; see Coroner's certificate.

13. (*a*) Had the deceased any other disease, acute or chronic, or has ever had any injury or infirmity: Had rheumatism several years ago.

(*b*) Was there anything in his habits or mode of life or residence predisposing him to disease: No.

14. (*a*) Did the deceased use spirituous liquors: Not excessively.

(*b*) To what extent: Drank a glass of beer occasionally.

(*c*) With what effect: None.

147 15. Did you see the body of the deceased, and did you identify it as that of the person described in the policy of insurance under which the claim is based: Yes.

ED B. CLEMENTS, M. D.

Oath.

STATE OF MISSOURI,
County of Macon, ss:

On this 6th day of October, A. D. 1906, personally appeared before me the above-named Ed B. Clements, a physician in regular standing, and made oath that the answers by him above made and subscribed, are true and full, to the best of his knowledge and belief.

[SEAL.] WALTER T. DUNAWAY,
Notary Public.

My commission expires June 9, 1909.

No. 4.

Friend's Certificate.

(The person who signs this blank must be a responsible householder.)

1. Name of the deceased in full: Frederick Wm. Blees.

2. Residence: Macon, Mo.

3. Occupation: Teacher and capitalist.

4. Date and place of death: Sept. 8, '06, St. Louis, Mo.

5. (*a*) State the cause of death as known to you: Heart disease.

148 (*b*) Who were the attending physicians: Dr. E. B. Clements was his physician for years.

6. Do you know the deceased to be the person insured by the above-named policy, by the name above given: Yes.

7. Have you any interest in the insurance upon the life of the deceased: No; except as administrator.

8. Read the statements of the claimant, the attending physician and the undertaker, and state whether they are correct and complete, according to your knowledge and belief: Yes.

(Signed) WM. R. COMPTON.

Oath.

STATE OF MISSOURI,
County of Macon, ss:

On this 6th day of October, A. D. 1906, personally appeared before me the above-named Wm. R. Compton and made oath that the answers by him above made and subscribed, are true and full, to the best of his knowledge and belief.

[SEAL.] WALTER T. DUNAWAY,
Notary Public.

My commission expires June 9, 1909.

Mr. O'Donohoe: I shall not read all this in evidence unless you—I will state simply to the jury that these are proofs furnished by Mr. William R. Compton and Edward D. Clements, administrators of the estate of Frederick W. V. Blees, deceased, under policy number 698,307, for $5,000, on the life of Frederick W. V. Blees, issued to him by the defendant in this case. These consist of the un-
149 dertaker's certificate and the claimant's certificate, and the attending physician's certificate, and the friend's certificate; also certified copy, or rather copy showing that the will of Frederick W. V. Blees was admitted to probate in the Probate Court of Macon County, Missouri, in August, 1906, on the 15th day of September, 1906.

Mr. O'Donohoe: I offer in evidence, your Honor, a stipulation entered into by and between plaintiff, through her attorney, and the defendant, through its counsel, and will ask that it be marked "Plaintiff's Exhibit 6."

Mr. Holliday: Now, if your Honor please, it appears on the face of this stipulation at the time it was entered into, it was agreed that all rights to object to its being offered in evidence in this case were reserved, the sole purpose of the stipulation being to obviate the necessity of going on with taking depositions; therefore, at this time, I wish to object to reading of the stipulation. I object to part first of the stipulation on the ground that the matter therein contained is incompetent, irrelevant and immaterial, under the issues in this case as framed by the decision of the Supreme Court of Missouri en banc in November last. I object to the reading in evidence of part two of the stipulation for the same reason, and for the further reason that it can only be offered in support of an attempt now to inject into this case a question of the right of the insured, or the plaintiff, to participate in an alleged surplus on this policy, and,

therefore, is a departure from the allegations of the petitions heretofore filed, an attempt to constitute a new cause of action; furthermore, that on the terms of the policy in suit it is utterly incompetent, irrelevant and immaterial.

The Court: Of course, I don't know what it contains.

Mr. Holliday: You might let his Honor examine it.

The Court: Where was this stipulation prepared?

Mr. Holliday: Prepared in New York about two weeks ago, wasn't it, Mr. O'Donohoe?

Mr. O'Donohoe: Yes, about two weeks ago.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

Said Plaintiff's Exhibit 6 is in words and figures, as follows:

PLAINTIFF'S EXHIBIT 6.

In the Circuit Court of the City of St. Louis, April Term, 1919.

No. 82,584.

MARY S. LIEBING, Plaintiff,

vs.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant.

Stipulation.

It is hereby stipulated and agreed by and between the parties to the above-entitled cause by their respective attorneys of record, that the following stipulations and each of them may be read in evidence at the trial of the above-entitled cause to be held on May 12, 1919, or at any adjournment or continuance thereof; provided, however, that each of the parties of record hereby expressly reserves the right to object to the competency, relevancy or materiality of the facts as stated in said stipulations, or either of them, at the time of the trial, and that the fact that said stipulations are hereby entered into is not to be taken or considered as a waiver by either of said parties of any of the points made or to be made by them or either of them, at said trial, but that said stipulations are merely entered into in order to avoid the necessity of the taking of testimony.

I.

That on or about the 7th day of October, 1904, Fred W. V. Blees and Mary S. Blees, his wife (now Mary S. Liebing, plaintiff herein), signed the certain loan agreement heretofore received in evidence in this case in the City of Macon and State of Missouri, and delivered said loan agreement so signed, together with the policy in suit No.

1,207,072, to one Dwight H. Payson, then a soliciting agent of the defendant at Macon, Missouri; that said Dwight H. Payson on or about said 7th day of October, 1904, forwarded said loan agreement and policy to F. N. Cheney, the then manager of the defendant company's St. Louis office, and that said F. N. Cheney transmitted
152 said loan agreement and policy to the Home Office of the defendant company in the City of New York on or about the 8th day of October, 1904, and that said loan agreement and policy were received at the defendant company's office in the City of New York and State of New York on the 10th day of October, 1904.

That on or about the 12th day of October, 1904, the defendant transmitted a check on the American Exchange National Bank of New York in the sum of four thousand seven hundred ninety dollars and fifty cents ($4,790.50), payable to Frederick W. V. Blees and Mary S. Blees, being the balance due said Frederick W. V. Blees on the loan of nine thousand five hundred fifty dollars ($9,550) made by said Frederick W. V. Blees and Mary S. Liebing on the policy in suit, after the deduction of four thousand two hundred ninety-one dollars and fifty cents ($4,291.50), which was applied to pay the premium due on said policy on the 29th day of September, 1904, and four hundred sixty-eight dollars ($468) interest.

That said check was by the defendant mailed from its Home Office in the City of New York and State of New York to the City of St. Louis and State of Missouri, addressed to Mr. F. N. Cheney, who was defendant's then manager in charge of its St. Louis, Missouri, office.

That accompanying said check was the following letter:

153 "The Mutual Life Insurance Company of New York.

Richard A. McCurdy, President, New York.

Department of Correspondence.

Duer du Pont Breck,

(D.) Corresponding Secretary.

Oct. 12/04.

Mr. F. N. Cheney.

DEAR SIR:

Referring to yours of Oct. 9/04 we enclose herewith check for loan as stated below, which expires Sept. 29/05.

Yours truly,

DUER DU P. BRECK,
D. (C)or. Sec.

Policy No. 1,207,072—Blees.

Amount of loan	$9,550.
Less premiums	4,291.50
Less interest at 5%	468.
Check	$4,790.50

Enc. Prem. receipt for Sept. 29/04."

That thereafter, on or about the — day of October, 1904, Mr. F. N. Cheney, who was defendant's then manager in charge of its St. Louis, Missouri, office, as aforesaid, forwarded said check to Mr. Dwight H. Payson, who was defendant's then soliciting agent at Macon, Missouri, and that thereafter, on or about the — day of October, 1904, Mr. Dwight H. Payson delivered said check to Frederick W.
154 V. Blees, the insured.

That thereafter, on or about the 18th day of October, 1904, said Frederick W. V. Blees and Mary S. Blees endorsed said check and deposited the same with the National Bank of Commerce in St. Louis, Missouri.

That said National Bank of Commerce in St. Louis then forwarded said check to the Merchants Exchange National Bank of the City of New York for collection, and that said Merchants Exchange National Bank collected the same from said American Exchange National Bank of the City of New York on or about the 19th day of October, 1904.

II.

It is further stipulated that the annual dividends which would have been apportioned to a policy issued in the year 1901 at age 41 on the 10-payment life plan, had it been issued on the annual-dividend plan, were per $1,000 of insurance, for the year 1902, $4.31, for the year 1903, $5.72, for the year 1904, $5.19, and for the year 1905, $5.47.

It is further stipulated that no dividends were apportioned to any deferred dividend policy such as the policy in suit, either on the books of the company or otherwise, provisionally or actually, unless and until said policy completed its deferred dividend period during the lifetime of the insured and all premiums were paid thereon when due.

155 It is further stipulated that during the years 1902, 1903, 1904 and 1905 there was carried on the books of the company a contingent guarantee fund, one part of which consisted of the annual contributions per $1,000 of insurance which would have been apportioned to all deferred dividend policies then in force had they been issued on the annual dividend plan, but that no allotment or apportionment or attribution, or payment of any portion of said fund was made to any individual deferred dividend policy, or group of deferred dividend policies, unless and until each said policy under its

terms reached the end of its deferred dividend period and all premiums were duly paid thereon, and the insured was alive at the end of the dividend period.

That said contingent guarantee fund was not carried by the company as a liability on its books, nor was it reported or required to be reported as a liability in any of its annual reports to the insurance departments of the different states.

That in the event any deferred dividend policy terminated in any way, by death, surrender or lapse, before the end of the deferred dividend period, a proportionate amount was deducted from said part of the contingent fund heretofore referred to, at the close of the year in which the termination occurred.

It is further stipulated that the annexed schedule "A" correctly states the method in use by the defendant company in determining the amount of surplus distributable to a deferred dividend policy at the end of its deferred dividend period, where the policy has
156 been maintained in force by the due payment of premiums thereon and insured has survived the distribution period, and that the figures therein contained represent per $1,000 of insurance the annual contributions for the years 1902, 1903, 1904 and 1905, with compound interest, which would have been paid to a policy issued in 1901 at age 41, on the 10-payment life plan, had it been issued on the annual dividend plan. And that the final deduction of $11.56 from the amount of the four annual contributions of 1902, 1903, 1904 and 1905, with compound interest thereon, viz., $21.94, is the excess of the reserve held for each 10-payment life, 20-year distribution policy for $1,000, issued at age 41 in the year 1901, at the end of four policy years, over the amount of the tabular reserve for such a policy calculated according to the American Experience Table of Mortality, assuming 3½ per cent interest, such a deduction being made in the deferred dividend fund at the end of the fourth year and corresponding to the deduction in (*d*) above in Schedule "A" at the end of the 20-year period for the calculation of the 20-year distribution dividend at the end of the distribution period.

Dated, New York, April 25th, 1919.

(Signed) JAMES J. O'DONOHOE,
Attorney for Plaintiff.

(Signed) FORDYCE, HOLLIDAY & WHITE,
Attorneys for Defendant.

157 SCHEDULE A.

The Mutual Life's Method of Calculating Deferred Dividends at End of Deferred-Dividend Period.

I.

Rule.—The company's twenty-year and other long-term distribution dividends are calculated in the following way:

(*a*) The annual dividends which would have been allotted to the policy, had it been on the annual dividend plan, are taken;

(*b*) These annual dividends are accumulated at compound inter-
, at the rates used each year by the company in its dividend calcu-
ions, up to the end of the distribution period;

(*c*) The accumulated amount of these annual dividends is in-
ased by a percentage, graded mathematically according to the age
the insured, to recompense the policyholder for the risks which he
s run, and which he would not have run had his policy been on
e annual dividend plan, of losing surplus through death, discontin-
nce or otherwise during the distribution period; and

(*d*) In the case of those twenty-year distribution policies issued in
e years 1898 to 1906, both inclusive, where the policy guarantees a
sh value at and after the end of the dividend period in excess of the
bular American 3½% reserve, the amount so found is reduced by
e excess of such cash value over such reserve.

Kind of policy, ten payment life.

58 Issued in year 1901, at age 41. Annual premium per $1,000, $65.77.

irst annual contribution (1902)	$4.310
nterest thereon	.185
econd annual contribution (1903)	5.720
um end second year	10.215
nterest thereon	.419
hird annual contribution (1904)	5.190
um end third year	15.824
nterest thereon	.649
ourth annual contribution (1905)	5.470
um end fourth year per $1,000 ins	21.943
ess excess reserve over tabular American 3½% reserve	11.56
Amount held per $1,000 ins. at end fourth year in deferred dividend fund	$10.38

Mr. O'Donohoe: I ask that a letter dated New York, January 24th, 917, signed J. A. Jackson——

The Court: January, what date is that?

Mr. O'Donohoe: January 24th, 1917; signed J. A. Jackson, Manger Literary Department, addressed to James J. O'Donohoe, be narked "Plaintiff's Exhibit 7."

(Thereupon the reporter marked the same, "Plaintiff's Exhibit 7".)

Mr. O'Donohoe: I offer it in evidence.

Mr. Holliday: I object to reading that letter in evidence, your Honor, for the reason that it refers to gross premium, the gross premium charged by the company on policies. It was only admitted at the last trial of this case in support of the plaintiff's contention
59 that this suit was based upon the non-forfeiture law of the State of Missouri; outside of that it had no relevancy in the case whatsoever; under the issues as defined by the last decision of the Su-

preme Court, that question having been removed from the case, the question now being what the laws of New York are, and how they apply to this case, this letter has absolutely no relevancy in the case.

The Court: This letter is being offered in accordance with section 7878?

Mr. O'Donohoe: Yes, your Honor (shows letter to the Court.)

The Court: Seventy-eight ninety-seven, 1899.

Mr. O'Donohoe: They are entitled to have deducted from the face of the policy full premium on an ordinary life premium basis.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

Mr. Holliday: Save my exception to that. I now wish to state, your Honor, that the introduction of any evidence tending to support a cause of action based on the non-forfeiture statute of Missouri, section 7897, as it existed before it was amended, and so to construe that statute as to make it applicable to the facts in this case, this loan agreement having been executed in New York, and governed by the laws of New York, would be to render that statute unconstitutional and void, and that it would be an attempt to apply a Missouri
160 statute to a New York contract, and it would be to deny full faith and credit to the laws of the State of New York, in violation of Section 1, Article IV of the Constitution of the United States.

Said Plaintiff's Exhibit 7 is in words and figures, as follows:

PLAINTIFF'S EXHIBIT 7.

The Mutual Life Insurance Company of New York.

New York, January 24th, 1917.

Mr. James J. O'Donohoe,
No. 509 Chestnut street,
St. Louis, Mo.

DEAR SIR:

Your favor of January 20th received. Our premium charge for an ordinary life policy of $1,000, issued at age 41, in the year 1901, amounted to $33.93, and is figured on the basis of the American Experience Table of Mortality and 3½ per cent interest. On all policies issued since 1906 we have used the same mortality table, but have changed our interest rate from 3½ to 3 per cent.

Yours very truly,

J. A. JACKSON,
Manager Literary Department.

Mr. O'Donohoe: If the Court please, I offer in evidence the original petition in this case.

Mr. Holliday: Well, I object to that as incompetent, irrelevant and

immaterial, the case now being on trial on the second amended petition filed by the plaintiff.

161 The Court: I suppose it is offered for the purpose of showing there is no departure, is it?

Mr. O'Donohoe: Yes, your Honor.

The Court: It may be offered.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

Said original petition is in words and figures as follows:

STATE OF MISSOURI,
City of St. Louis, ss:

In the Circuit Court, City of St. Louis, February Term, 1913.

MARY S. LIEBING, Plaintiff,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant.

Mary S. Liebing states that she is the plaintiff in the above-entitled cause, and that the defendant is now and has been at all of the dates hereinafter mentioned a corporation duly organized and incorporated under and by virtue of the laws of the State of New York, and as such corporation is now and has been at all of said dates engaged in the life insurance business in the State of Missouri and elsewhere.

162 Plaintiff further states that on or about the 29th day of September, 1901, defendant, at the City of Macon, County of Macon, in the State of Missouri, by its policy of insurance number 1,207,072 (which cannot be filed herewith because same is in the possession of defendant), in consideration of the premiums therein stated, insured the life of Frederick W. V. Blees, a resident and citizen of the State of Missouri, and promised, in case of his death, to deliver to his executors and administrators or assigns, gold bonds to the value of $50,000.00, or to pay the sum of $65,250.00, at the option of the executors, administrators or assigns of the insured, on the conditions stated in said policy.

Plaintiff further states that Frederick W. V. Blees, the insured under said policy, died on or about the 8th day of September, 1906, and up to the time of his death he had in all respects complied with and duly performed all conditions and provisions in said policy by him to be complied with and performed.

Plaintiff further states that Frederick W. V. Blees, the insured under said policy, duly assigned said policy to plaintiff on or about the 2nd day of March, 1904, which said assignment was duly accepted and acquiesced in by said defendant.

Plaintiff further states that she was the wife of said Frederick W.

V. Blees, the insured under said policy, and the assignee of said policy, and that soon after the decease of the insured, to wit, on or about the 15th day of September, 1906, plaintiff notified the defendant of his death and made claim on defendant under said policy and demanded payment thereof, but said defendant refused to
163 pay the same or any part thereof, and then and there disclaimed all liability under said policy.

Plaintiff further states that premiums were duly paid on said policy to the 29th day of September, 1905, and that by the payment of said premiums said policy, under its own conditions and under the laws of the State of Missouri, acquired a net value, three-fourths of which, when taken or applied as a net single premium for temporary insurance for the full amount written in said policy, continued said policy in full force for the face amount thereof to and beyond the 8th day of September, 1906, when the insured died.

Plaintiff further states that, as above alleged, the premiums were duly paid on said policy till the 29th day of September, 1905, but no premium was paid on said policy thereafter, and that the premium due on said policy on the 29th day of September, 1905, for the next ensuing policy year, amounted to the sum of four thousand two hundred and ninety-one dollars and fifty cents.

Plaintiff further states that on or about the 12th day of October, 1904, at the City of Macon, County of Macon, in the State of Missouri, Frederick W. V. Blees, the insured, borrowed from defendant, on the security of said policy, the sum of nine thousand five hundred and fifty dollars.

Plaintiff further states that the loan of nine thousand five hundred and fifty dollars aforesaid and interest thereon from the 12th day of October, 1905, at the rate of 6 per cent per annum, together with the foreborne premium of four thousand two hundred and ninety-one dollars and fifty cents aforesaid, with interest compounded thereon at the rate of 6 per cent per annum, may be deducted
164 from said policy, being, as plaintiff believes, a proper deduction under the non-forfeiture laws of the State of Missouri.

Plaintiff further states that on sundry occasions prior to the institution of this suit, particularly on or about the 15th day of September, 1906, plaintiff duly demanded of defendant payment of said policy, less the loan aforesaid and interest thereon as aforesaid, and less the foreborne premium aforesaid and interest compounded thereon as aforesaid, but said defendant vexatiously refused to pay the same or any part thereof, and then and there denied all liability under said policy.

Wherefore, plaintiff prays judgment against defendant in the sum of sixty-five thousand two hundred and fifty dollars, with interest thereon at the rate of 6 per cent per annum from the 15th day of September, 1906, at the rate of 6 per cent per annum (less the loan of nine thousand five hundred and fifty dollars aforesaid and interest thereon at the rate of 6 per cent per annum, from the 12th day of October, 1905, and less the unpaid premium of four thousand two hundred and ninety-one dollars and fifty cents, with interest compounded thereon at the rate of 6 per cent per annum from the

9th day of September, 1905); 10 per cent on the sum due under aid policy as damages and a reasonable attorney's fee for vexatious efusal to pay said policy.

JAMES J. O'DONOHOE,
Attorney for Plaintiff.

Mr. O'Donohoe: We next offer in evidence the defendant's answer, filed March 17th, 1913, filing of which appears——

65 The Court: When is that, March when?

Mr. O'Donohoe: Seventeenth, 1913.

Mr. Holliday: That is objected to as incompetent, irrelevant and mmaterial, under any of the issues now before the Court.

The Court: I assume that is offered for the same purpose?

Mr. O'Donohoe: Same purpose, your Honor.

The Court: It may be offered.

Which objection was by the Court overruled; to which action and uling of the Court defendant, by its counsel, then and there duly bjected and excepted and still objects and excepts.

Mr. O'Donohoe: Filing of which appears in record book 263, at age 151.

Said defendant's answer (omitting caption) is in words and figures s follows:

Answer.

Now comes the Mutual Life Insurance Company of New York, nd, leave of Court having been obtained, files its answer to the pe- ition of the plaintiff heretofore filed herein, and for such answer dmits that the defendant is now and has been at all the dates in aid petition mentioned a corporation duly organized and incorpo- ated under and by virtue of the laws of the State of New York, and, s such corporation, is now and at all the dates in said petition men- ioned, was engaged in the life insurance business in the State of Missouri and elsewhere. And defendant denies each and

166 every, all and singular, the other allegations in said petition contained.

Wherefore, having answered, defendant prays to be hence dismissed.

And, for its first affirmative answer and defense, and without waiving the denial above pleaded, defendant states that on the 29th day of September, 1901, the defendant issued its certain policy of insurance numbered 1,207,072, upon the life of one Frederick W. V. Blees, whereby, in consideration of an annual deposit or premium of $4,291.50, defendant agreed to deliver gold bonds to the value of fifty thousand dollars ($50,000.00) to the insured, his executors, administrators or assigns, provided that the delivery of said bonds should be conditional upon the surrender of said policy after it should have been maintained, according to its terms, in full force and effect until its termination, and the acceptance of satisfactory proofs of death

of the said Frederick W. V. Blees, made in the manner provided by the policy. Said policy is herewith filed and marked "Exhibit A."

Defendant further states that the said Frederick W. V. Blees paid the deposits upon said policy due on the 29th day of September, 1901; the 29th day of September, 1902; the 29th day of September, 1903, and the 29th day of September, 1904; but that neither said Frederick W. V. Blees, nor any other person for him, paid the deposit due on said policy on the 29th day of September, 1905.

Defendant further states that on or about the 2nd day of March, 1904, the said Frederick W. V. Blees assigned his interest in
167 said policy to the plaintiff, at that time, his wife, Mary S. Blees, and this assignment was acknowledged by the defendant. That, thereafter, to wit, on or about the 1st day of October, 1904, said Frederick W. V. Blees and Mary S. Blees made application to the defendant for a loan upon said policy, the amount of said loan to be the full surrender value of said policy on the 29th day of September, 1905, or nine thousand, five hundred and fifty dollars ($9,550.00); and, thereafter, to wit, on the 12th day of October, 1904, the said Frederick W. V. Blees and Mary S. Blees signed a certain loan agreement and received said loan of $9,550.00 on the security of said policy. That the proceeds of said loan were divided as follows, $4,291.50 to pay the premium due on said policy September 29th, 1904; $468.00 for interest; $4,790.50 by the company's check. That by the terms of said loan agreement, in the event of default in the payment of said loan on the date of its maturity, viz., on the 29th day of September, 1905, the company was authorized, at its option, without notice and without demand for payment, to cancel said policy and apply said cash surrender consideration of $9,550.00 to the payment of said loan with interest. Said loan agreement is herewith filed and marked "Exhibit B."

Defendant states that said loan was not paid on the 29th day of September, 1905, and thereupon the company exercised its said option and applied said cash surrender consideration to the payment of said loan and canceled said policy, and that said policy was thereafter null and void and of no effect.

Wherefore, having answered, defendant prays to be hence dismissed.

168 And, for a second affirmative answer and defense, and without waiving the denial above pleaded, defendant states that on the 29th day of September, 1901, it issued its said policy of insurance numbered 1,207,072 upon the life of said Frederick W. V. Blees, which policy has been herewith filed and marked "Defendant's Exhibit A," and the said Frederick W. V. Blees paid the deposit or premium due on said policy for the years 1901, 1902, 1903 and 1904, which said payments carried said policy in force and effect up to the 29th day of September, 1905.

That on the 2nd day of March, 1904, said Frederick W. V. Blees assigned his interest in said policy to the plaintiff, and that thereafter, to wit, on or about the 12th day of October, 1904, said Frederick W. V. Blees and the plaintiff applied for and obtained a loan upon said policy in the total amount of $9,550.00, as shown by said loan agreement herewith filed and marked "Defendant's Exhibit B."

Defendant states that the premium due on said policy on September 29th, 1905, was not paid, nor was said loan of $9,550.00, due September 29th, 1905, ever paid by said Frederick W. V. Blees; and that, thereafter, to wit, on the 8th day of September, 1906, said Frederick W. V. Blees died, without having paid the premium on said policy, due September 29th, 1905, and without having repaid the said loan.

Defendant further states that the repayment of said loan was a condition of the insurance provided for in the policy, and that the failure of said Frederick W. V. Blees to repay the same was a violation of said condition and that, therefore, there had been a
169 violation of a condition of this insurance other than the nonpayment of premiums at the time of the death of said Frederick W. V. Blees and that, therefore, the company is not bound to pay the amount of said policy under Section 6948 of the Revised Statutes of Missouri 1909, but that on the contrary said policy had lapsed and the insurance had been canceled and the defendant is without liability thereunder.

Wherefore, having answered, defendant prays to be hence dismissed.

And for a third affirmative answer and defense, and without waiving the denial above pleaded, defendant states that on the 29th day of September, 1901, it issued its said policy of insurance numbered 1,207,072 upon the life of said Frederick W. V. Blees, which policy has been herewith filed and marked "Defendant's Exhibit A." And that said Frederick W. V. Blees paid the deposits or premiums due on said policy for the years 1901, 1902, 1903 and 1904, which said payments carried said policy in force and effect up to the 29th day of September, 1905. That on the 2nd day of March, 1904, said Frederick W. V. Blees assigned his interest in said policy to the plaintiff, then Mary S. Blees, his wife, and said assignment was acknowledged by the defendant. That thereafter, to wit, on or about the 12th day of October, 1904, said Frederick W. V. Blees and the plaintiff applied for and obtained a loan upon said policy in the total amount of $9,550.00, as shown by said loan agreement herewith filed and marked "Defendant's Exhibit B." That the proceeds of said loan were distributed as follows, to wit: To pay past-due pre-
170 miums on said policy to carry the same to the 29th day of September, 1905, four thousand, two hundred ninety-one dollars and fifty cents ($4,291.50). To pay interest at five per cent (5%), adjusted also for interest on the premium, four hundred sixty-eight dollars ($468.00). Balance by company's check, four thousand, seven hundred ninety dollars and fifty cents ($4,790.50); total, nine thousand, five hundred fifty dollars ($9,550.00).

Defendant states that the premium due on said policy on the 29th day of September, 1905, was not paid, nor was said loan of $9,550.00, due September 29, 1905, ever paid, except by the application of the surrender value of said policy to the payment of said loan, as aforesaid. That, thereafter, to wit, on the 8th day of September, 1906, said Frederick W. V. Blees died, without having paid the premium

on said policy due September 29, 1905, and without having repaid said loan.

Defendant further states that Section 7897 of the Revised Statutes of Missouri 1899, was amended by Act of the Legislature of Missouri at its session in 1903, which said act is found in the Laws of 1903, at page 208. That, by the terms of said amendment, the defendant was entitled to deduct from three-fourths of the net value of said policy computed upon the Actuaries' or Combined Experience Table of Mortality at 4% per annum, any notes or other evidences of indebtedness to the company, and that deducting from three-fourths of the net value of said policy so determined as of the 29th day of September, 1905, same being the day of lapse for default in payment of premiums on said policy, the said sum of $9,550.00, being the
171 amount of said loan then on said policy, did not leave sufficient reserve, which taken as a net single premium of temporary insurance for the full amount written in the policy, would carry said policy up to the date of the death of the insured.

Defendant further states that by the terms of said policy, neither the insured nor the plaintiff were entitled to a loan on said policy until the same should have been in force and effect for three (3) full years, viz., on or after the 29th day of September, 1904.

Defendant further states that no right to extended insurance vested in said insured, or in the plaintiff, either under the terms of the policy or by statute, until after three annual premiums had been paid upon said policy; and that at the date said amendment to the statute took effect, to wit, on the 21st day of June, 1903, but two annual premiums had been paid on said policy. Defendant, therefore, states that Section 7897, Revised Statutes of Missouri, 1899, as amended by said Act of 1903, applies to and governs the policy in suit, and that the defendant is entitled to deduct from three-fourths of the net value, calculated as above stated, the total amount of the indebtedness to the company on said policy at the date of lapse, and that to require the defendant to pay this policy will be to deny to the defendant due process of law and the equal protection of the laws, in violation of Section 1 of Article XIV of the Constitution of the United States, and Section 30 of Article II of the Constitution of the State of Missouri.

Wherefore, having answered, defendant prays to be hence dismissed.

172 And for a fourth affirmative answer and defense, and without waiving the denial above pleaded, or any of the other defenses above set out, the defendant avers that although said Frederick W. V. Blees died on the 8th day of September, 1906, and at the time of his death the premium due on said policy on the 29th day of September, 1905, remained unpaid, yet the plaintiff did not submit to the defendant notice of her claim and proof of the death of the said Frederick W. V. Blees, in the same manner as provided by the terms of the policy within ninety days after the death of the said Frederick W. V. Blees, as required by Section 7899 of the Revised Statutes of Missouri, 1899, then in force, and, therefore, no right to extended insurance on said policy accrued to the plaintiff,

and plaintiff is barred from asserting such right in this action on said policy.

Wherefore, having fully answered, defendant prays to be hence dismissed.

FORDYCE, HOLLIDAY & WHITE,
Attorneys for Defendant.

FREDERICK L. ALLEN,
Of Counsel.

Mr. Donohoe: We next offer in evidence defendant's amended answer, filed April 17th, 1913, filing of which appears in record book 263, page 222.

Mr. Holliday: I object to that offer, for the same reason: it is utterly incompetent, irrelevant and immaterial under the issues now involved.

The Court: The same ruling.

Which objection was by the Court overruled, to which action and ruling of the Court defendant, by its counsel then and there
173 duly objected and excepted, and still objects and excepts.

Said defendant's amended answer (omitting caption), is in words and figures as follows:

Amended Answer.

Now comes the Mutual Life Insurance Company of New York and, leave of Court having been obtained, files its amended answer to the petition of the plaintiff heretofore filed herein, and for such amended answer admits that the defendant is now and has been at all the dates in said petition mentioned a corporation duly organized and incorporated under and by virtue of the laws of the State of New York and, as such corporation, is now and at all the dates in said petition mentioned was engaged in the life insurance business in the State of Missouri and elsewhere. And defendant denies each and every, all and singular, the other allegations in said petition contained.

Wherefore, having answered, defendant prays to be hence dismissed.

And for its first affirmative answer and defense, and without waiving the denial above pleaded, defendant states that on the 29th day of September, 1901, the defendant issued its certain policy of insurance, numbered 1,207,072, upon the life of one Frederick W. V. Blees, whereby in consideration of an annual deposit or premium of $4,291.50, defendant agreed to deliver gold bonds to the value of fifty thousand dollars ($50,000.00) to the insured, his executors, administrators or assigns, provided that the delivery of said bonds should be conditional upon the surrender of said policy after
174 it should have been maintained, according to its terms, in full force and effect until its termination, and the acceptance of satisfactory proofs of death of the said Frederick W. V. Blees

made in the manner provided by the policy. Said policy is herewith filed and marked "Exhibit A".

Defendant further states that the said Frederick W. V. Blees paid the deposit upon said policy due on the 29th day of September, 1901, the 29th day of September, 1902, the 29th day of September 1903, and the 29th day of September, 1904, but that neither said Frederick W. V. Blees, nor any other person for him, paid the deposit due on the said policy on the 29th day of September, 1905.

Defendant further states that on or about the 2nd day of March, 1904, the said Frederick W. V. Blees assigned his interest in said policy to the plaintiff, at that time his wife, Mary S. Blees, and this assignment was acknowledged by the defendant. That thereafter, to wit, on or about the 1st day of October, 1904, said Frederick W. V. Blees and Mary S. Blees made application to the defendant for a loan upon said policy, the amount of said loan to be the full surrender value of said policy on the 29th day of September, 1905, or nine thousand five hundred and fifty dollars ($9,550.00); and thereafter, to wit: On the 12th day of October, 1904, the said Frederick W. V. Blees and Mary S. Blees signed a certain loan agreement and received said loan of $9,550.00 on the security of said policy. That the proceeds of said loan were divided as follows:

Four thousand two hundred ninety-one dollars fifty cents
175 to pay the premium due on said policy September 29, 1904;
Four hundred sixty-eight dollars for interest;

Four thousand seven hundred ninety dollars fifty cents by the company's check.

That by the terms of said loan agreement, in the event of default in the payment of said loan on the date of its maturity, viz.: On the 29th day of September, 1905, the company was authorized, at its option, without notice and without demand for payment, to cancel said policy and apply said cash surrender consideration of $9,550.00 to the payment of said loan with interest. Said loan agreement is herewith filed and marked "Exhibit B."

Defendant states that said loan was not paid on the 29th day of September, 1905, and thereupon the company exercised its said option and applied said cash surrender consideration to the payment of said loan and canceled said policy, and that said policy was thereafter null and void and of no effect.

Wherefore, having answered, defendant prays to be hence dismissed.

And for a second affirmative answer and defense, and without waiving the denial above pleaded, defendant states that on the 29th day of September, 1901, it issued its said policy of insurance numbered 1,207,072 upon the life of said Frederick W. V. Blees, which policy has been herewith filed and marked "Defendant's Exhibit A", and the said Frederick W. V. Blees paid the deposit or premium due on said policy for the years 1901, 1902, 1903 and 1904, which said payments carried said policy in force and effect up to the 29th day of September, 1905.

That on the 2nd day of March, 1904, said Frederick W. V.
176 Blees assigned his interest in said policy to the plaintiff, and that thereafter, to wit, on or about the 12th day of October, 1904, said Frederick W. V. Blees and the plaintiff applied for and obtained a loan upon said policy in the total amount of nine thousand five hundred fifty dollars ($9,550.00), as shown by said loan agreement herewith filed and marked "Defendant's Exhibit B."

Defendant states that the premium due on said policy on September 29th, 1905, was not paid, nor was said loan of $9,550.00 due September 29th, 1905, ever paid by said Frederick W. V. Blees, and that thereafter, to wit, on the 8th day of September, 1906, said Frederick W. V. Blees died without having paid the premium on said policy due September 29th, 1905, and without having repaid the said loan.

Defendant further states that the repayment of said loan was a condition of the insurance provided for in the policy and that the failure of said Frederick W. V. Blees to repay the same was a violation of said condition and that, therefore, there had been a violation of a condition of this insurance other than the non-payment of premiums at the time of the death of the said Frederick W. V. Blees, and that, therefore, the company is not bound to pay the amount of said policy under Section 6948 of the Revised Statutes of Missouri 1909, but that on the contrary said policy had lapsed and the insurance had been canceled and the defendant is without liability thereunder.

Wherefore, having answered, defendant prays to be hence dismissed.

And for a third affirmative answer and defense, and without waiving the denial above pleaded, defendant states that on the 29th
177 day of September, 1901, it issued its said policy of insurance numbered 1,207,072 upon the life of said Frederick W. V. Blees, which policy has been herewith filed and marked "Defendant's Exhibit A". And that said Frederick W. V. Blees paid the deposits or premiums due on said policy for the years 1901, 1902, 1903 and 1904, which said payments carried said policy in force and effect up to the 29th day of September, 1905. That on the 2nd day of March, 1904, said Frederick W. V. Blees assigned his interest in said policy to the plaintiff, then Mary S. Blees his wife, and said assignment was acknowledged by the defendant. That, thereafter, to wit, on or about the 12th day of October, 1904, said Frederick W. V. Blees and the plaintiff applied for and obtained a loan upon said policy in the total amount of $9,550.00, as shown by said loan agreement herewith filed and marked "Defendant's Exhibit B". That the proceeds of said loan were distributed as follows, to wit: To pay past due premium on said policy to carry the same to the 29th day of September, 1905, four thousand two hundred ninety-one dollars and fifty cents ($4,291.50); to pay interest at five per cent (5%) adjusted also for interest on the premium, four hundred sixty-eight dollars ($468.00): Balance by company's check, four thousand seven hundred ninety dollars and fifty cents ($4,790.50): Total nine thousand five hundred fifty dollars ($9,950.00).

Defendant state that the premium due on said policy on the 29th day of September, 1905, was not paid, nor was said loan of $9,550.00

due September 29th, 1905, ever paid, except by the application of the surrender value of said policy to the payment of said loan
178 as aforesaid. That, thereafter, to wit, on the 8th day of September, 1906, said Frederick W. V. Blees died without having paid the premium on said policy due September 29th, 1905, and without having repaid said loan.

Defendant further states that Section 7897 of the Revised Statutes of Missouri 1899, was amended by act of the Legislature of Missouri at its session in 1903, which said act is found in the laws of 1903 at page 208. That by the terms of said amendment the defendant was entitled to deduct from three-fourths of the net value of said policy computed upon the Actuaries' or Combined Experience Table of Mortality at 4% per annum, any notes or other evidence of indebtedness to the company, and that deducting from three-fourths of the net value of said policy so determined as of the 29th day of September, 1905, same being the day of lapse for default in payment of premiums on said policy, the said sum of $9,550.00, being the amount of said loan then on said policy, did not leave sufficient reserve, which taken at a net single premium of temporary insurance for the full amount written in the policy, would carry said policy up to the date of the death of the insured.

Defendant further states that by the terms of said policy neither the insured nor the plaintiff were entitled to a loan on said policy until the same should have been in force and effect for three (3) full years, viz., on or after the 29th day of September, 1904.

Defendant further states that no right to extend insurance vested in said insured, or in the plaintiff, either under the terms of the policy or by statute, until after three annual premiums had been paid upon said policy; and that at the date said amendment to
179 the statute took effect, to wit, on the 21st day of June, 1903, but two annual premiums had been paid on said policy. Defendant therefore states that Section 7897, Revised Statutes of Missouri 1899, as amended by said act of 1903, applies to and governs the policy in suit, and that the defendant is entitled to deduct from three-fourths of the net value, calculated as above stated, the total amount of the indebtedness to the company on said policy at the date of lapse, and that to require the defendant to pay this policy will be to deny to the defendant due process of law and the equal protection of the laws in violation of Section 1 of Article XIV of the Constitution of the United States, and Section 30 of Article II of the Constitution of the State of Missouri.

Wherefore, having answered, defendant prays to be hence dismissed.

And for a fourth affirmative answer and defense, and without waiving the denial above pleaded, or any of the other defenses above set out, the defendant avers that although said Frederick W. V. Blees died on the 8th day of September, 1906, and at the time of his death the premium due on said policy on the 29th day of September, 1905, remained unpaid, yet the plaintiff did not submit to the defendant notice of her claim and proof of the death of the said Frederick W. V. Blees, in the same manner as provided by the terms of the policy

within ninety days after the death of the said Frederick W. V. Blees, as required by Section 7899 of the Revised Statutes of Missouri 1899, then in force, and therefore no right to extended insurance on said policy accrued to the plaintiff, and plaintiff is barred from asserting such right in this action on said policy.

180 Wherefore, having answered, defendant prays to be hence dismissed.

And for a fifth affirmative answer and defense, and without waiving the denial above pleaded, or any of the other defenses above set out, the defendant avers that plaintiff's alleged cause of action, if any, is based upon a liability created by a statute of Missouri other than a penalty or forfeiture, and that said alleged cause of action, if any, arose upon the date of the death of Frederick W. V. Blees, to wit, upon the th day of September, 1906, and was by the statute of limitations of the State of Missouri barred in five (5) years thereafter, or on the 8th day of September, 1911, long prior to the date of filing of this action.

Wherefore, having fully answered, defendant prays to be hence dismissed.

FORDYCE, HOLLIDAY & WHITE,
Attorneys for Defendant.

Mr. O'Donohoe: We next offer in evidence the plaintiff's reply, filed April 30th, 1913, appearing in record book 263, page 260.

Mr. Holliday: Also objected to for the same reasons—incompetent and irrelevant under the issues now controlling this case.

The Court: Same ruling.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

Said plaintiff's reply is in words and figures (omitting caption) as follows:

181 Now comes plaintiff in the above-entitled cause and, for her reply to the defendant's amended answer filed herein, denies each and every allegation therein contained.

For further reply to the fourth affirmative defense set up in said amended answer, plaintiff states that within ninety days after the death of the insured, plaintiff notified the defendant thereof and made claim of defendant under said policy, but said defendant failed and neglected to furnish plaintiff with blanks on which to make proofs of death; that within ninety days after the decease of the insured, defendant disclaimed all liability under said policy on the grounds that there was a loan on said policy and a default in the payment of premium, thus waiving notice of claim and proofs of death.

JAMES J. O'DONOHOE,
Attorney for Plaintiff.

Mr. O'Donohoe: We next offer in evidence the judgment of nonsuit and dismissal of plaintiff's petition, which appears in record book 263, page 297. I would like to read that into the record, your Honor.

Mr. Holliday: I object to that also as incompetent, irrelevant and immaterial under the issues.

The Court: Same objection, same ruling.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

Mr. O'Donohoe (reading said judgment of nonsuit and dismissal of plaintiff's petition):

Number 82584-A.

MARY S. LIEBING

against

182 THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

Now at this day come again the parties as aforesaid, and come also again the jurors sworn and impaneled herein; thereupon the trial of this cause is resumed and progressed, and at the close of the plaintiff's case, the Court, at the request of the defendant, gave to the jury the following instruction, to wit: "The Court instructs the jury that, under the pleadings and the evidence offered for the plaintiff, their perdict must be in favor of the defendant." Wherefore, owing to the adverse rulings of the Court, the plaintiff says she will not further prosecute her suit in this behalf, but with leave to move to set the same aside will take a nonsuit. It is now, therefore, ordered and adjudged by the Court that the plaintiff's cause of action herein be, and the same is hereby, dismissed at the cost of said plaintiff and Sarah J. Clauss, the surety on the cost bond herein, for which let execution issue. Instruction filed.

Mr. O'Donohoe: I next offer in evidence the mandate of the Supreme Court on that appeal.

Mr. Holliday: That is objected to as incompetent, irrelevant and immaterial under any of the issues involved in this case, improper, prejudicial to offer to read now.

The Court: Same ruling; that is reported in the 269th?

Mr. O'Donohoe: What is it, your Honor?

The Court: Is that the opinion reported in the 269th, page 509?

Mr. O'Donohoe: Yes, your Honor; that is the same opinion; opinion on the first appeal.

Which objection was by the Court overruled; to which
183 action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

Mr. O'Donohoe (reading):

In the Supreme Court of Missouri, October Term, 1916.

MARY S. LIEBING, Appellant,

against

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Respondent.

Appeal from the Circuit Court, City of St. Louis.

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the said cause be remanded to the said Circuit Court of the City of St. Louis, with directions to said court to set aside its order overruling the motion to set aside nonsuit herein, and to sustain said motion and proceed with the cause in a manner not out of accord with the opinion of this Court herein delivered; and that the said appellant recover against the said respondent her costs and charges herein expended, and have execution therefor. Opinion filed.

STATE OF MISSOURI, *sct:*

I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of the Supreme Court, entered of record at the October Term thereof, 1916, and on the 20th day of December, 1916, in the above-entitled cause.

Given under my hand and seal of said court, at the City of Jefferson, this 18th day of January, 1917.

J. D. ALLEN,
Clerk.

Mr. Holliday: Now, if your Honor please, I move to strike out the mandate just read by Mr. O'Donohoe to the jury, on the
184 grounds given in the objection to its introduction in evidence, and that the jury be instructed to disregard the same.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

Mr. O'Donohoe: I next offer in evidence plaintiff's amended petition filed February 2d, 1917, and her second amended petition filed——

The Court: February 2d, 1917?

Mr. O'Donohoe: Yes, your Honor, second; and her second amended petition, filed February 3rd, 1917.

Said plaintiff's amended petition is in words and figures (caption omitted), as follows:

Amended Petition.

Mary S. Liebing states that she is the plaintiff in the above-entitled cause and, having first obtained leave of Court, files this her amended petition. And for said amended petition plaintiff states that the defendant is now and was at all of the dates hereinafter mentioned a corporation duly organized and incorporated under and by virtue of the laws of the State of New York; that at all of said dates and prior thereto defendant was and still is a resident and citizen of the State of Missouri, and pursuant to the laws of the State of Missouri, defendant maintains and has at all of said dates maintained several offices in the State of Missouri; that at all of said dates, prior and subsequent thereto, defendant was and now is transacting the business of life insurance in the State of Missouri; that the de-
185 fendant thereby became subject to, and thereby agreed to be bound by, all the laws of the State of Missouri then in force or thereafter enacted.

Plaintiff further states that on or about the 29th day of September, 1901, at the City of Macon, State of Missouri, Frederick W. V. Blees made written application to defendant for a policy of insurance, and upon said written application, on or about the 29th day of September, 1901, defendant, at the City of Macon, County of Macon, Missouri, issued its written policy of insurance, number 1207072 (which is on file), by which policy, in consideration of the premiums therein stated, defendant insured the life of said Frederick W. V. Blees, and promised, in case of his death and acceptance of due proofs thereof by defendant, to deliver to his executors, administrators or assigns, fifty bonds, each of the denomination of one thousand dollars, to be issued by defendant, and payable twenty years from the first day of January or July next ensuing the date thereof, in gold coin of the United States of America of the present standard of weight and fineness, with interest thereon at the rate of 5 per centum per annum, payable in like gold coin semi-annually on the first day of January and July, or to pay to said executors, administrators or assigns the sum of sixty-five thousand two hundred and fifty gold dollars in lieu of the issuance of said fifty thousand dollars of gold bonds at the option of said executors, administrators or assigns; that at the time said policy was issued, prior thereto and up to his death, Frederick W. V. Blees, the insured, was a resident and citizen of the State of Missouri, and that he died on or about the 8th day of September, 1906, and
186 that every condition of said policy was complied with by the insured during his lifetime and by the plaintiff since his death; that plaintiff was the wife of said insured, and assignee of said policy, and she is now and was at all of the dates herein named a resident and citizen of the State of Missouri.

Plaintiff further states that Frederick W. V. Blees, the insured, continued to pay premiums on said policy until the 29th day of September, 1905, when the said insured discontinued the payment of further premiums; that at the time of lapse, namely, on the 29th

day of September, 1905, more than three full annual premiums had been paid on said policy, to wit, four annual premiums had been paid thereon, and the net value of said policy, at date of lapse, the 29th day of September, 1905, under the non-forfeiture statutes of the State of Missouri in such cases made and provided, amounted to the sum of eleven thousand two hundred and thirty dollars and eighty-three cents.

Plaintiff further states that on or about the 12th day of October, 1904, Frederick W. V. Blees, the insured, and the plaintiff herein, at the City of Macon, in the State of Missouri, jointly made application to defendant for a loan of nine thousand five hundred and fifty dollars, and at said city and state the said Frederick W. V. Blees, the insured, and plaintiff herein signed and executed a loan agreement therefor, and on or about the 12th day of October, 1904, the defendant, at said City of Macon, Missouri, pursuant to said application and loan agreement, lent the said insured and plaintiff the said sum of nine thousand five hundred and fifty dollars, at an agreed rate of interest of 5 per cent per annum; that the
187 proceeds of said loan were distributed and applied in the City of Macon, Missouri, as follows, to wit: four thousand two hundred and ninety-one dollars and fifty cents was applied to pay the annual premium due the 29th day of September, 1904, thus paying the premiums on said policy to the 29th day of September, 1905; four hundred and sixty-eight dollars was applied to pay interest on said loan to the 29th day of September, 1905, and to pay interest on said premium; and four thousand seven hundred and ninety dollars and fifty cents was paid to the insured and plaintiff herein.

Plaintiff further says that, as above stated, at the date of lapse, namely, on the 29th day of September, 1905, the net or reserve value of said policy, calculated under the non-forfeiture statutes of the State of Missouri, in such cases made and provided, amounted to the sum of eleven thousand two hundred and thirty dollars and eighty-three cents; that three-fourths of said net value is eight thousand four hundred and twenty-three dollars and twelve cents; that deducting four thousand seven hundred and fifty-nine dollars and fifty cents (which is the aggregate amount applied to pay the premium due on the 29th day of September, 1904, and to pay interest on said loan and premium) leaves three thousand six hundred and sixty-three dollars and sixty-two cents, which sum ($3,663.62), taken or applied as a net single premium, as provided by the Missouri non-foreiture statutes in force when said policy was issued, extends said policy from date of lapse, September 29th, 1905, for a period of four years, nine months and eighteen days, and the insured died within said period, for he died on the 8th day of
188 September, 1906; that is eleven months and ten days from the 29th day of September, 1905, date of lapse.

Plaintiff further states that she has elected to take cash in lieu of bonds.

Plaintiff further states that at the time said policy was issued the insured was aged 41 years, and that the highest gross annual ordi-

nary-life premium per thousand ever charged by defendant on a policy issued at age 41 years is thirty-four dollars and sixteen cents (this is equal to or greater than the ordinary life premium mentioned in the Missouri non-forfeiture statutes); that the gross annual ordinary life premium on the policy in suit, calculated at the rate of thirty-four dollars and sixteen cents per thousand is the sum of two thousand two hundred and twenty-eight dollars and ninety-four cents ($2,228.94) and the interest thereon at the rate of 6 per cent per annum from the date when due (the 29th day of September, 1905) to the day the insured died (the 8th day of September, 1906—eleven months, ten days) amounts to the sum of one hundred and twenty-five dollars and ninety-eight cents ($125.98).

Plaintiff further states that interest at the rate of 5 per cent per annum is due and unpaid on said loan of nine thousand five hundred and fifty dollars from the 12th day of October, 1905, to the 8th day of September, 1906, the day the insured died; that is, ten months, twenty-seven days; and amounts to the sum of four hundred and thirty-three dollars and sixty-five cents ($433.65).

Plaintiff further states that said unpaid gross annual ordinary life premium ($2,228.94), and interest thereon ($125.98), together with said loan ($9,550.00), and interest thereon ($433.65), aggre-
189 gate the sum of $12,338.57, and that the same may be deducted from the face amount of said policy ($65,250.00), being, as plaintiff believes, a proper deduction therefrom under the non-forfeiture laws of the State of Missouri, thus reducing said policy to the sum of $52,911.43.

Plaintiff further states that at the City of Macon, Missouri, Frederick W. V. Blees duly assigned said policy to plaintiff and said defendant accepted said assignment and acquiesced therein in said city and state; that the premiums which were paid on said policy were thus paid to defendant in the State of Missouri.

Plaintiff further states that this action was instituted by plaintiff in the Circuit Court of the City of St. Louis, Missouri, on the 9th day of December, 1912; and thereafter, on the 16th day of May, 1913, plaintiff suffered an involuntary nonsuit in said Circuit Court in said cause; and thereafter, on the 20th day of December, 1916, the Supreme Court of the State of Missouri reversed and remanded said cause with directions to the Circuit Court to set aside said nonsuit and reinstate said cause on its trial docket.

Plaintiff further states that on sundry occasions prior to the institution of this action the plaintiff called the defendant's attention to the applicable statutes and decisions of the State of Missouri, by virtue of which statutes and decisions defendant had no valid cause or excuse to refuse or delay payment of said policy, yet plaintiff avers that, in spite of said statutes and decisions, and with full knowledge of plaintiff's rights as fixed by said policy under the laws of the State of Missouri, the said defendant vexatiously refused to pay
190 said policy and vexatiously and to delay payment set up in its answers five defenses, each and every one of which it then well knew to be untenable and frivolous.

Plaintiff further states that on divers occasions prior to the insti-

tution of this action, especially on or about the 3rd day of November, 1906, plaintiff duly demanded of defendant payment of the amount due under said policy, but said defendant, on sundry occasions, particularly on the 20th day of November, 1906, vexatiously refused to pay the same or any part thereof, and then and there vexatiously disclaimed all liability under said policy.

Wherefore, plaintiff prays for judgment against defendant for the sum of fifty-two thousand nine hundred and eleven dollars and forty-three cents, with interest thereon at the rate of 6 per cent per annum from the 20th day of November, 1906 (the date defendant denied liability under said policy), together with 10 per cent on the amount due under said policy as damages; and a reasonable fee for her attorney's services in preparing and prosecuting this action because of the vexatious refusal of defendant to pay said policy.

JAMES J. O'DONOHOE,
Attorney for Plaintiff.

Received copy this 2 day of February, 1917.
FORDYCE, HOLLIDAY & WHITE,
Attorneys for Defendant.

191 Said plaintiff's second amended petition is in words and figures (caption omitted) as follows:

Second Amended Petition.

Mary S. Liebing states that she is the plaintiff in the above-entitled cause, and having first obtained leave of Court, files this, her second amended petition. And for said second amended petition plaintiff states that the defendant is now and was at all of the dates hereinafter mentioned a corporation duly organized and incorporated under and by virtue of the laws of the State of New York; and at all of said dates and prior thereto defendant was and still is a resident and citizen of the State of Missouri, and pursuant to the laws of the State of Missouri defendant maintains and has at all of said dates maintained several offices in the State of Missouri; that at all of said dates, prior and subsequent thereto, defendant was and now is transacting the business of life insurance in the State of Missouri; that the defendant thereby became subject to and thereby agreed to be bound by all the laws of the State of Missouri then in force or thereafter enacted.

Plaintiff further states that on or about the 29th day of September, 1901, at the City of Macon, State of Missouri, Frederick W. V. Blees made written application to defendant for a policy of insurance and upon said written application, on or about the 29th day of September, 1901, defendant, at the City of Macon, County of Macon, Missouri, issued its written policy of insurance number 1,207,072 (which is on file, and made a part hereof as much so as if fully set forth herein) by which policy in consideration of the premiums therein
192 stated defendant insured the life of said Frederick W. V. Blees and promised in case of his death and acceptance of

due proofs thereof by defendant to deliver to his executors, administrators or assigns, fifty bonds, each of the denomination of one thousand dollars, to be issued by defendant, and payable twenty years from the first day of January or July next ensuing the date thereof, in gold coin of the United States of America of the present standard of weight and fineness, with interest thereon at the rate of five per centum per annum payable in like gold coin semi-annually on the first day of January and July, or to pay to said executors, administrators or assigns the sum of sixty-five thousand two hundred and fifty gold dollars in lieu of the issuance of said fifty thousand dollars of gold bonds at the option of said executors, administrators, or assigns; that at the time said policy was issued, prior thereto and up to his death, Frederick W. V. Blees, the insured, was a resident and citizen of the State of Missouri, and that he died on or about the 8th day of September, 1906, and that every condition of said policy was complied with by the insured during his lifetime, and by the plaintiff since his death; that plaintiff was the wife of said insured and assignee of said policy, and she is now and was at all of the dates herein named a resident and citizen of the State of Missouri.

Plaintiff further states that Frederick W. V. Blees, the insured, continued to pay premiums on said policy until the 29th day of September, 1905, when the said insured discontinued the payment of further premiums; that at the time of lapse, namely, on the 29th day of September, 1905, more than three full annual pre-
193 miums had been paid on said policy, to wit, four annual premiums had been paid thereon, and the net value of said policy, at date of lapse—the 29th day of September, 1905, under the non-forfeiture statutes of the State of Missouri, in such cases made and provided, amounted to the sum of eleven thousand two hundred and thirty dollars and eighty-three cents.

Plaintiff further states that on or about the 12th day of October, 1904, Frederick W. V. Blees, the insured, and the plaintiff herein, at the City of Macon, in the State of Missouri, jointly made application to defendant for a loan of nine thousand five hundred and fifty dollars, and at said city and state the said Frederick W. V. Blees, the insured, and plaintiff herein, signed and executed a loan agreement therefor, and on or about the 12th day of October, 1904, the defendant, at said City of Macon, Missouri, pursuant to said application and loan agreement, lent the said insured and plaintiff the said sum of nine thousand five hundred and fifty dollars at an agreed rate of interest of 5 per cent per annum; that the proceeds of said loan were distributed and applied in the City of Macon, Missouri, as follows, to wit, four thousand two hundred and ninety-one dollars and fifty cents was applied to pay the annual premium due the 29th day of September, 1904, thus paying the premiums on said policy to the 29th day of September, 1905; four hundred and sixty-eight dollars was applied to pay interest on said loan to the 29th day of September, 1905, and to pay interest on said premium; and four thousand seven hundred and ninety dollars and fifty cents was paid to the insured and plaintiff herein.

Plaintiff further says that, as above stated, at the date of
194 lapse, namely, on the 29th day of September, 1905, the net or reserve value of said policy calculated under the non-forfeiture statutes of the State of Missouri, in such cases made and provided, amounted to the sum of eleven thousand two hundred and thirty dollars and eighty-three cents; that three-fourths of said net value is eight thousand four hundred and twenty-three dollars and twelve cents; that deducting four thousand seven hundred and fifty-nine dollars and fifty cents therefrom (which is the aggregate amount applied to pay the premium due on the 29th day of September, 1904, and to pay interest on said loan and premium) leaves three thousand six hundred and sixty-three dollars and sixty-two cents, which sum $3,663.62), taken or applied as a net single premium as provided by the Missouri non-forfeiture statutes in force when said policy was issued, extends said policy in full force for the full amount written therein from date of lapse, September 29th, 1905, for a period of four years, nine months and eighteen days, and the insured died within said period, for he died on the 8th day of September, 1906; that is eleven months and ten days from the 29th day of September, 1905, date of lapse.

Plaintiff further states that she has elected to take cash in lieu of bonds.

Plaintiff further states that at the time said policy was issued the insured was of the age of 41 years, and the highest gross annual ordinary life premium per thousand ever charged by defendant on a policy issued at age 41 years is thirty-four dollars and sixteen cents (this is equal to or greater than the ordinary life premium mentioned in the Missouri non-forfeiture statutes); that the gross
195 annual ordinary life premium on the policy in suit, calculated at the rate of thirty-four dollars and sixteen cents per thousand, is the sum of two thousand two hundred and twenty-eight dollars and ninety-four cents ($2,228.94), and the interest thereon at the rate of 6 per cent per annum from the date when due (the 29th day of September, 1905) to the day the insured died (the 8th day of September, 1906—11 months, 10 days) amounts to the sum of one hundred and twenty-five dollars and ninety-eight cents ($125.98).

Plaintiff further states that interest at the rate of 5 per cent per annum is due and unpaid on said loan of nine thousand five hundred and fifty dollars from the 12th day of October, 1905, to the 8th day of September, 1906, the day the insured died; that is, 10 months, 27 days, and amounts to the sum of four hundred and thirty-three dollars and sixty-five cents ($433.65).

Plaintiff further states that said unpaid gross annual ordinary life premium ($2,228.94), and interest thereon ($125.98), together with said loan ($9,550.00), and interest thereon ($433.65), aggregate the sum of $12,338.57, and that the same may be deducted from the face amount of said policy ($65,250.00), being, as plaintiff believes, a proper deduction therefrom under the non-forfeiture laws of the State of Missouri, thus reducing said policy to the sum of $52,911.43.

Plaintiff further states that at the City of Macon, Missouri, Frederick W. V. Blees duly assigned said policy to plaintiff and said de-

fendant accepted said assignment and acquiesced therein in said city and state; that the premiums which were paid on said policy were thus paid to defendant in the State of Missouri.

196 Plaintiff further states that this action was instituted by plaintiff in the Circuit Court of the City of St. Louis, Missouri, on the 9th day of December, 1912; and thereafter, on the 16th day of May, 1913, plaintiff suffered an involuntary nonsuit in said Circuit Court in said cause; and thereafter, on the 20th day of December, 1916, the Supreme Court of the State of Missouri reversed and remanded said cause with directions to the Circuit Court to set aside said nonsuit and reinstate said cause on its trial docket.

Plaintiff further states that on sundry occasions prior to the institution of this action the plaintiff called the defendant's attention to the applicable statutes and decisions of the State of Missouri, by virtue of which statutes and decisions defendant had no valid cause or excuse to refuse or delay payment of said policy, yet plaintiff avers that in spite of said statutes and decisions and with full knowledge of plaintiff's rights as fixed by said policy under the laws of the State of Missouri, the said defendant vexatiously refused to pay said policy and vexatiously and to delay payment set up in its answers five defenses, each and every one of which it then well knew to be untenable and frivolous.

Plaintiff further states that on divers occasions prior to the institution of this action, especially on or about the 3rd day of November, 1906, plaintiff duly demanded of defendant payment of the amount due under said policy, but said defendant on sundry occasions, particularly on the 20th day of November, 1906, vexatiously refused to pay the same or any part thereof, and then and there vexatiously disclaimed all liability under said policy.

Wherefore, plaintiff prays for judgment against defendant

197 for the sum of fifty-two thousand nine hundred and eleven dollars and forty-three cents, with interest thereon at the rate of 6 per cent per annum from the 20th day of November, 1906 (the date defendant denied liability under said policy), together with 10 per cent on the amount due under said policy as damages; and a reasonable fee for her attorney's services in preparing and prosecuting this action because of the vexatious refusal of defendant to pay said policy.

JAMES J. O'DONOHOE,
Attorney for Plaintiff.

Received copy this 3rd day of February, 1917.
FORDYCE, HOLLIDAY & WHITE,
Attorneys for Defendant.

Mr. O'Donohoe: I next offer in evidence the defendant's motion to strike out part of the second amended petition, and the order and judgment of the Court sustaining the defendant's motion to strike out part of plaintiff's second amended petition, which was done on March 7th, 1917.

Said defendant's motion to strike out part of the second amended petition, and the order and judgment of the Court sustaining the defendant's motion to strike out part of plaintiff's second amended petition (omitting caption) are in words and figures, as follows:

198 *Defendant's Motion to Strike Out Part of Plaintiff's Second Amended Petition.*

Now, at this day, comes defendant, and files its motion to strike out part of plaintiff's second amended petition, to wit: Beginning with the third paragraph on page six of said second amended petition and continuing through the next paragraph, all of which reads as follows:

"Plaintiff further states that this action was instituted by plaintiff in the Circuit Court of the City of St. Louis, Missouri, on the 9th day of December, 1912; and, thereafter, on the 16th day of May, 1913, plaintiff suffered an involuntary nonsuit in said Circuit Court in said cause; and, thereafter, on the 20th day of December, 1916, the Supreme Court of the State of Missouri reversed and remanded said cause, with directions to the Circuit Court to set aside said nonsuit and reinstate said cause on its trial docket.

Plaintiff further states that on sundry occasions prior to the institution of this action the plaintiff called the defendant's attention to the applicable statutes and decisions of the State of Missouri, by virtue of which statutes and decisions defendant had no valid cause or excuse to refuse or delay payment of said policy, yet plaintiff avers that in spite of said statutes and decisions, and with full knowledge of plaintiff's rights as fixed by said policy under the laws of the State of Missouri, the said defendant vexatiously refused to pay said policy and vexatiously and to delay payment set up in its answers five defenses, each and every one of which it then well knew to be untenable and frivolous."

199 And, for grounds for said motion, defendant states that the matter contained in said paragraphs is irrelevant and improper, and no part of the issues in said cause, and inserted for the purpose of prejudicing this defendant.

Respectfully submitted,

FORDYCE, HOLLIDAY & WHITE,
Attorneys for Defendant.

Mr. O'Donohoe: I next offer in evidence plaintiff's term bill of exceptions, signed and filed March 15th, 1917.

Said plaintiff's term bill of exceptions (caption omitted), is in words and figures, as follows:

Plaintiff's Term Bill of Exceptions.

Be it remembered, that in the progress of the above-entitled cause the following proceedings were had, to wit:

On the third day of February, 1917, being one of the days of the December Term, 1916, of the Circuit Court of the City of St. Louis, Missouri, the plaintiff, by leave of said Circuit Court and by its order duly entered of record, filed her second amended petition.

Thereafter, on the 23d day of February, 1917, being one of the days of the February Term, 1917, of said Circuit Court, the plaintiff, by leave of said Circuit Court and by its order duly entered of record, refiled her said second amended petition; which said second
200 amended petition is in words and figures as follows, namely;

Second Amended Petition.

(Omitting Caption.)

Mary S. Liebing states that she is the plaintiff in the above-entitled cause, and having first obtained leave of court, files this, her second amended petition. And for said second amended petition plaintiff states that the defendant is now and was at all of the dates hereinafter mentioned a corporation duly organized and incorporated under and by virtue of the laws of the State of New York; that at all of said dates and prior thereto defendant was and still is a resident and citizen of the State of Missouri, and pursuant to the laws of the State of Missouri defendant maintains and has at all of said dates maintained several offices in the State of Missouri; that at all of said dates, prior and subsequent thereto, defendant was and now is transacting the business of life insurance in the State of Missouri; that the defendant thereby became subject to and thereby agreed to be bound by all the laws of the State of Missouri then in force or thereafter enacted.

Plaintiff further states that on or about the 29th day of September, 1901, at the City of Macon, State of Missouri, Frederick W. V. Blees made written application to defendant for a policy of insurance, and upon said written application, on or about the 29th day of September, 1901, defendant, at the City of Macon, County of
201 Macon, Missouri, issued its written policy of insurance number 1207072 (which is on file and made a part hereof as much so as if fully set forth herein), by which policy, in consideration of the premiums therein stated, defendant insured the life of said Frederick W. V. Blees and promised in case of his death and acceptance of due proofs thereof by defendant to deliver to his executors, administrators or assigns, fifty bonds, each of the denomination of one thousand dollars, to be issued by defendant and payable twenty years from the first day of January or July next ensuing the date thereof, in gold coin of the United States of America, of the present standard of weight and fineness, with interest thereon at the rate of 5 per centum per annum, payable in like gold coin, semi-annually on the first day of January and July, or to pay to said executors, administrators or assigns the sum of sixty-five thousand two hundred and fifty gold dollars in lieu of the issuance of said fifty thousand dollars of gold bonds at the option of said executors,

administrators or assigns; that at the time said policy was issued, prior thereto and up to his death, Frederick W. V. Blees, the insured, was a resident and citizen of the State of Missouri, and that he died on or about the 8th day of September, 1906, and that every condition of said policy was complied with by the insured during his lifetime and by the plaintiff since his death; that plaintiff was the wife of said insured and assignee of said policy, and she is now and was at all of the dates herein named a resident and citizen of the State of Missouri.

Plaintiff further states that Frederick W. V. Blees, the insured, continued to pay premiums on said policy until the 29th day
202 of September, 1905, when the said insured discontinued the payment of further premiums; that at the time of lapse, namely, on the 29th day September, 1905, more than three full annual premiums had been paid on said policy, to wit: four annual premiums had been paid thereon, and the net value of said policy, at date of lapse—the 29th day of September, 1905—under the non-forfeiture statutes of the State of Missouri in such cases made and provided, amounted to the sum of eleven thousand two hundred and thirty dollars and eighty-three cents.

Plaintiff further states that on or about the 12th day of October, 1904, Frederick W. V. Blees, the insured, and the plaintiff herein, at the City of Macon, in the State of Missouri, jointly made application to defendant for a loan of nine thousand five hundred and fifty dollars, and at said city and state the said Frederick W. V. Blees, the insured, and plaintiff herein signed and executed a loan agreement therefor, and on or about the 12th day of October, 1904, the defendant, at said City of Macon, Missouri, pursuant to said application and loan agreement, lent the said insured and plaintiff said sum of nine thousand five hundred and fifty dollars at an agreed rate of interest of 5 per cent per annum; that the proceeds of said loan were distributed and applied in the City of Macon, Missouri, as follows, to wit: Four thousand two hundred and ninety-one dollars and fifty cents was applied to pay the annual premium due the 29th day of September, 1904, thus paying the premiums on said policy to the 29th day of September, 1905; four hundred and sixty-eight dollars was applied to pay interest on said loan to the 29th day of September, 1905, and to pay interest on said premium; and four
203 thousand seven hundred and ninety dollars and fifty cents was paid to the insured and plaintiff herein.

Plaintiff further says that, as above stated, at the date of lapse, namely, on the 29th day of September, 1905, the net or reserve value of said policy, calculated under the non-forfeiture statutes of the State of Missouri, in such cases made and provided, amounted to the sum of eleven thousand two hundred and thirty dollars and eighty-three cents; that three-fourths of said net value is eight thousand four hundred and twenty-three dollars and twelve cents that deducting four thousand seven hundred and fifty-nine dollars and fifty cents therefrom (which is the aggregate amount applied to pay the premium due on the 29th day of September, 1904, and to pay interest on said loan and premium) leaves three thousand six hundred and

sixty-three dollars and sixty-two cents, which sum ($3,663.62), taken or applied as a net single premium, as provided by the Missouri non-forfeiture statutes in force when said policy was issued, extends said policy in full force for the full amount written therein from date of lapse, September 29th, 1905, for a period of four years, nine months and eighteen days, and the insured died within said period, for he died on the 8th day of September, 1906; that is, eleven months and ten days from the 29th day of September, 1905, date of lapse.

Plaintiff further states that she has elected to take cash in lieu of bonds.

Plaintiff further states that at the time said policy was issued the insured was of the age of 41 years, and the highest gross annual ordinary life premium per thousand ever charged by de-
204 fendant on a policy issued at age 41 years is thirty-four dollars and sixteen cents (this is equal to or greater than the ordinary life premium mentioned in the Missouri non-forfeiture statutes); that the gross annual ordinary life premium on the policy in suit, calculated at the rate of thirty-four dollars and sixteen cents per thousand is the sum of two thousand two hundred and twenty-eight dollars and ninety-four cents ($2,228.94), and the interest thereon at the rate of 6 per cent per annum from the date when due (the 29th day of September, 1905) to the day the insured died (the 8th day of September, 1906—11 months, 10 days) amounts to the sum of one hundred and twenty-five dollars and ninety-eight cents ($125.98).

Plaintiff further states that interest at the rate of 5 per cent per annum is due and unpaid on said loan of nine thousand five hundred and fifty dollars from the 12th day of October, 1905, to the 8th day of September, 1906, the day the insured died; that is, ten months twenty-seven days, and amounts to the sum of four hundred and thirty-three dollars and sixty-five cents ($433.65).

Plaintiff further states that said unpaid gross annual ordinary life premium ($2,228.94), and interest thereon ($125.98), together with said loan ($9,550.00), and interest thereon ($433.65), aggregate the sum of $12,338.57, and that the same may be deducted from the face amount of said policy ($65,250.00), being, as plaintiff believes, a proper deduction therefrom under the non-forfeiture laws of the State of Missouri, thus reducing said policy to the sum of $52,-911.43.

205 Plaintiff further states that at the City of Macon, Missouri, Frederick W. V. Blees duly assigned said policy to plaintiff and said defendant accepted said assignment and acquiesced therein in said city and state; that the premiums which were paid on said policy were thus paid to defendant in the State of Missouri.

Plaintiff further states that on divers occasions prior to the institution of this action, especially on or about the 3rd day of November, 1906, plaintiff duly demanded of defendant payment of the amount due under said policy, but said defendant, on sundry occasions, particularly on the 20th day of November, 1906, vexatiously refused to pay the same or any part thereof, and then and there vexatiously disclaimed all liability under said policy.

Wherefore, plaintiff prays for judgment against defendant for the sum of fifty-two thousand nine hundred and eleven dollars and forty-three cents, with interest thereon at the rate of 6 per cent per annum from the 20th day of November, 1906 (the date defendant denied liability under said policy), together with 10 per cent on the amount due under said policy as damages, and a reasonable fee for her attorney's services in preparing and prosecuting this action because of the vexatious refusal of defendant to pay said policy.

JAMES J. O'DONOHOE,
Attorney for Plaintiff.

Received copy this 3rd day of February, 1917.

FORDYCE, HOLLIDAY & WHITE,
Attorneys for Defendant.

206 (Here insert said second amended petition.)

On the 7th day of February, 1917, being one of the days of the February Term, 1917, of said Circuit Court, the defendant, by order of Court duly entered of record, filed its motion to strike out part of plaintiff's said second amended petition.

Thereafter, on the 23d day of February, 1917, being one of the days of the February Term, 1917, of said Circuit Court, the defendant, by an order of Court duly entered of record, refiled its said motion to strike out part of plaintiff's second amended petition; which motion is in words and figures as follows, to wit:

Defendant's Motion to Strike Out Part of Plaintiff's Second Amended Petition.

Now, at this day, comes defendant, and files its motion to strike out part of plaintiff's second amended petition, to wit: Beginning with the third paragraph on page six of said second amended petition and continuing through the next paragraph, all of which reads as follows:

"Plaintiff further states that this action was instituted by plaintiff in the Circuit Court of the City of St. Louis, Missouri, on the 9th day of December, 1912; and, thereafter, on the 16th day of May, 1913, plaintiff suffered an involuntary nonsuit in said Circuit Court in said cause; and, thereafter, on the 20th day of December, 1916, the Supreme Court of the State of Missouri reversed and re-

207 manded said cause, with directions to the Circuit Court to set aside said nonsuit and reinstate said cause on its trial docket.

Plaintiff further states that on sundry occasions prior to the institution of this action the plaintiff called the defendant's attention to the applicable statutes and decisions of the State of Missouri, by virtue of which statutes and decisions defendant had no valid cause or excuse to refuse or delay payment of said policy, yet plaintiff avers that in spite of said statutes and decisions, and with full knowl-

edge of plaintiff's rights as fixed by said policy under the laws of the State of Missouri, the said defendant vexatiously refused to pay said policy and vexatiously and to delay payment set up in its answers five defenses, each and every one of which it then well knew to be untenable and frivolous."

And, for grounds for said motion, defendant states that the matter contained in said paragraphs is irrelevant and improper, and no part of the issues in said cause, and inserted for the purpose of prejudicing this defendant.

Respectfully submitted,

FORDYCE, HOLLIDAY & WHITE,
Attorneys for Defendant.

The defendant's said motion to strike out part of plaintiff's second amended petition was argued and submitted, and therefore, namely, on the 7th day of March, 1917, being one of the days of the February Term, 1917, of said Circuit Court, the said Circuit Court, by its order and judgment, duly entered of record, sustained the defendant's said motion to strike out part of the plaintiff's said
208 second amended petition; to which action, order and judgment of the Court in thus sustaining plaintiff's said motion, the plaintiff then and there duly excepted and at the time saved her exceptions.

And in order that the above matters and things, rulings and exceptions may become and be made a part of the record in this cause the plaintiff tenders this, her term bill of exceptions, and prays that the same may be allowed, signed, sealed and filed and made a part of the record in this cause, which is accordingly done this 15th day of March, 1917, being one of the days of February Term, 1917, of said Circuit Court.

J. HUGO GRIMM,
Judge of the Circuit Court of the City of St. Louis, Missouri, Division Number One.

Mr. O'Donohoe: I ask that a letter dated Macon, Missouri, November 3d, 1906, signed by Dysart and Mitchell, to Fred N. Cheney, Manager, St. Louis, Missouri, be marked "Plaintiff's Exhibit 8."

Thereupon the Reporter marked the same "Plaintiff's Exhibit 8."

Mr. Holliday: At this time, your Honor, I wish to make an objection referring not only to this letter, but to all these other letters, which I assume Mr. O'Donohoe now is about to have identified, and offered in evidence, on the ground that they are incompetent, irrelevant and immaterial, and of no value under the issues as now framed in this case.

The Court: Overruled.

Which objection was by the Court overruled; to which
209 action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

Mr. O'Donohoe: And that a letter dated St. Louis, Missouri, November 5th, 1906, from Frederick N. Cheney, to Mr. James McKean, General Solicitor, be marked "Plaintiff's Exhibit 9."

Thereupon the Reporter marked the same "Plaintiff's Exhibit 9."

Mr. O'Donohoe: And that a letter dated November 16th, 1906, from J. McKean, General Solicitor, to Messrs. Dysart and Mitchell, be marked "Plaintiff's Exhibit 10."

Thereupon the Reporter marked the same "Plaintiff's Exhibit 10."

Mr. O'Donohoe: And that a letter dated New York, November 20th, 1906, signed James McKean, General Solicitor, to Messrs. Dysart and Mitchell, be marked "Plaintiff's Exhibit 11."

Thereupon the Reporter marked the same "Plaintiff's Exhibit 11."

Mr. O'Donohoe: That a letter dated October 2d, 1912, from James J. O'Donohoe, to Mutual Life Insurance Company, be marked "Plaintiff's Exhibit 12."

Thereupon the Reporter marked the same "Plaintiff's Exhibit 12."

Mr. O'Donohoe: And a letter dated New York, October 8th, 1912, signed Frederick L. Allen, General Solicitor, to J. J. O'Donohoe, be marked "Plaintiff's Exhibit 13."

Thereupon the Reporter marked the same "Plaintiff's Exhibit 13."

210 Mr. O'Donohoe: And a letter from Mary S. Liebing, to Mutual Life Insurance Company, New York City, New York, dated October 9th, 1912, be marked "Plaintiff's Exhibit 14."

Thereupon the Reporter marked the same "Plaintiff's Exhibit 14."

Mr. O'Donohoe: And a letter dated October 14th, 1912, from James J. O'Donohoe, to Mr. Frederick L. Allen, General Solicitor, Mutual Life Insurance Company of New York, New York City, New York, be marked "Plaintiff's Exhibit 15."

Thereupon the Reporter marked the same "Plaintiff's Exhibit 15."

Mr. O'Donohoe: That a letter dated October 17th, 1912, from Frederick L. Allen, General Solicitor, to James J. O'Donohoe, be marked "Plaintiff's Exhibit 16."

Thereupon the Reporter marked the same "Plaintiff's Exhibit 16."

Mr. O'Donohoe: And a letter dated October 22, 1912, from James J. O'Donohoe, to Mr. Frederick L. Allen, be marked "Plaintiff's Exhibit 17."

Thereupon the Reporter marked the same "Plaintiff's Exhibit 17."

Mr. O'Donohoe: That a letter from Frederick L. Allen, General Solicitor, to James J. O'Donohoe, dated October 25th, 1912, be marked "Plaintiff's Exhibit 18."

Thereupon the Reporter marked the same "Plaintiff's Exhibit 18."

Mr. O'Donohoe: That a letter dated New York, October 30th, 1912, signed Frederick L. Allen, to James J. O'Donohoe, be marked "Plaintiff's Exhibit 19."

211 Thereupon the Reporter marked the same "Plaintiff's Exhibit 19".

Mr. O'Donohoe: That a letter from James J. O'Donohoe to Mr. Frederick L. Allen, General Solicitor, dated November 2d, 1912, be marked "Plaintiff's Exhibit 20".

Thereupon the Reporter marked the same "Plaintiff's Exhibit 20".

Mr. O'Donohoe: That a letter dated November 6th, 1912, from Frederick L. Allen, General Solicitor, to James J. O'Donohoe, be marked "Plaintiff's Exhibit 21".

Thereupon the Reporter marked the same "Plaintiff's Exhibit 21".

Mr. O'Donohoe: And a letter dated November 21st, 1912, from James J. O'Donohoe to Mr. Frederick L. Allen, General Solicitor, be marked "Plaintiff's Exhibit 22".

Thereupon the reporter marked the same "Plaintiff's Exhibit 22".

Mr. O'Donohoe: That a letter dated November 23d, 1912, from Frederick L. Allen to James J. O'Donohoe, be marked "Plaintiff's Exhibit 23".

Thereupon the reported marked the same "Plaintiff's Exhibit 23".

Mr. O'Donohoe: And a letter dated December 4th, 1912, from Frederick L. Allen to James J. O'Donohoe, be marked "Plaintiff's Exhibit 24".

Thereupon the reporter marked the same "Plaintiff's Exhibit 24".

Mr. O'Donohoe: I now offer in evidence, your Honor, Plaintiff's Exhibits 8 to 24, both inclusive.

Mr. Holliday: The same objection is made to the offer of these

letters in evidence as made at the time they were identified,
212 namely, that they are incompetent, irrelevant and immaterial to any issues in this cas-.

The Court: Same ruling.

Which objection was by the Court overruled, to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

Thereupon the Court duly and properly admonished the jury as to the proper conduct of its members while court should not be in session, and the court was then adjourned until the 13th day of May, 1919, at 10 o'clock a. m., at which day and hour court was duly reconvened and the jury being present as before, the following proceedings were had, to wit:

Mr. O'Donohoe: If the Court please, I now offer in evidence Plaintiff's Exhibits 8 to 24, inclusive.

The Court: I believe you offered those last night, Mr. O'Donohoe, and we passed upon it, and were just about to read them when we adjourned.

Mr. O'Donohoe: That's right.

Mr. O'Donohoe: Those exhibits, gentlemen, read as follows:

Plaintiff's Exhibit 8 is, in words and figures, as follows:

213 PLAINTIFF'S EXHIBIT 8.

Macon, Mo., November 3rd, 1906.

Fred N. Cheney, Manager,
St. Louis, Mo.

DEAR SIR:

We would like to have a copy of the policy No. 1,207,072, issued by the Mutual Life Insurance Company to F. W. Blees in September, 1901, and also a copy of the note executed to Colonel Blees to the company for $9,550. This policy was assigned and turned over to the company as collateral security for the payment of the said note, and both the said policy and the said note are in the possession of the company. If you cannot furnish the copies, please instruct us how we may obtain possession of such copies. If you cannot furnish copies asked for, please give us such information as you may have in regard to the said policy and the said loan. If the said policy is not in force for any amount, we would like to be assured of that fact so as not to go to any trouble or expense in suing upon the policy, but, of course, if the same is in force in whole or in part, we feel it to be our duty as the attorneys of Mrs. F. W. Blees, the assignee of the policy, to collect the same. Our present information is that there have been four full annual premiums paid on the same policy, the last payment being included in the said note for $9,550. It seems to us that this policy is subject to the law of extended and temporary insurance. Any facts you can give us on this subject will be thankfully received. If

you cannot furnish us the copies requested, please inform us of the character of the said policy, whether a straight life policy, an
214 endowment policy, or time payment policy. Was it the same in form as the one issued to me by your company? An early answer will be greatly appreciated.

Yours very truly,

(Signed) DYSART & MITCHELL.

Plaintiff's Exhibit 9 is, in words and figures, as follows:

PLAINTIFF'S EXHIBIT 9.

St. Louis, Mo., Nov. 5, 1906.

Mr. James McKeen,
General Solicitor.

DEAR SIR:

Enclosed please find letter of Attorneys Dysart & Mitchell, asking information regarding surrender of policy No. 1,207,072—Blees, together with copy of our reply.

May we ask you to reply to the letter and furnish us copy of your correspondence.

Very truly yours,

F. N. CHENEY,
Manager

Plaintiff's Exhibit 10 is, in words and figures, as follows:

215 PLAINTIFF'S EXHIBIT No. 10.

Nov. 16th, 1906.

Messrs. Dysart & Mitchell,
Attorneys at Law,
Macon, Missouri.

Re Policy, 1,207,072.

DEAR SIRS:

Your letter of November 3rd, addressed to Manager Cheney of St. Louis, Missouri, regarding the above, has been referred to me for attention. I will endeavor to reply within a few days.

Yours truly,

J. McKEAN,
General Solicitor.

Plaintiff's Exhibit 11 is in words and figures as follows:

PLAINTIFF'S EXHIBIT 11.

New York, Nov. 20th, 1906.

Messrs. Dysart & Mitchell,
Attorneys at Law,
Macon, Mo.

DEAR SIRS:

In re Pol. 1,207,072—Blees.

In reply to your letter of the 3rd inst. to our St. Louis manager, I beg to advise you that the above policy was written on a form practically the same as the form on which your Mr. Mitchell's policy No. 1,458,110 is written, the only difference being that in the
216 "surplus" clause of the Blees policy the words, "Provided the premiums are duly paid and the insured is then living," do not appear, and the words "if in force" are inserted in the said clause after the words "apportioned to this contract" in the first line of the clause. As requested, I enclose a copy of the loan agreement pledging the policy to the company as security for a loan of $9,550. You will note from the loan agreement that the loan became due on September 29th, 1905. As the loan was neither paid nor renewed at maturity the policy was canceled, as provided in the loan agreement. Since the amount loaned by the company equaled the stipulated surrender value of the policy at the date of maturity of the loan, there was no balance remaining payable to the policy-holder when the policy was canceled. Your information that four annual premiums were paid upon the policy is correct, the fourth premium having been paid by means of the loan.

From an examination of the policy provisions and the copy of the loan agreement, I have no doubt you will agree with us that there was no insurance in force under this policy at the date of Mr. Blees' death, which, we believe, occurred on September 8, 1906. I am,

Very truly yours,

JAMES McKEEN,
General Solicitor.

Plaintiff's Exhibit 12 is in words and figures as follows:

Mr. O'Donohoe: Name not appearing; shall I read it? These are copies.

217 Mr. Holliday: Oh, you mean that this is a copy of, that is copy of your—yes.

Mr. O'Donohoe (reading):

PLAINTIFF'S EXHIBIT 12.

October 2, 1912.

Mutual Life Insurance Co.,
New York City, New York.

GENTLEMEN:

Mrs. Mary S. Liebing states that she was the wife of Frederick W. V. Blees, who died in this city September of 1906. That her deceased husband while residing at Macon, Mo., was insured by one of your policies in the sum of $50,000.00. She does not know the number of the policy, but, being so large, you, no doubt, will easily find the same.

She states that after the policy was paid on for some years her deceased husband procured a loan thereon. She has employed me to secure the facts and give her an opinion as to whether the policy is of any value. Of course, I cannot do this without a copy of the policy and without a copy of the loan agreement before me, and, therefore, kindly let me have, at my expense, a copy of policy and copy of loan agreement.

Yours truly,

J. J. O'DONOHOE.

Plaintiff's Exhibit 13 is in words and figures as follows:

218 PLAINTIFF'S EXHIBIT 13.

New York, October 8, 1912.

Mr. J. J. O'Donohoe,
701-2 Houser Building,
509 Chestnut Street,
St. Louis, Mo.

DEAR SIR:

Frederick W. V. Blees.

In reply to your letter of the second instant, will you be kind enough to obtain a letter from Mary S. Liebing requesting the information that you desire and have her furnish an affidavit that she was the former wife of the late Frederick W. V. Blees?

Yours very truly,

FREDERICK L. ALLEN,
General Solicitor.

Plaintiff's Exhibit 14 is in words and figures as follows:

PLAINTIFF'S EXHIBIT 14.

October 9, 1912.

Mutual Life Insurance Company,
New York City, N. Y.

GENTLEMEN:

Kindly let my attorney, James J. O'Donohoe, have a copy of the policy issued by you on the life of Frederick W. V. Blees, my deceased husband, and also a copy of the loan agreement, and greatly oblige,

Yours truly,

MARY S. LIEBING.

219 Plaintiff's Exhibit 15 is in words and figures as follows:

PLAINTIFF'S EXHIBIT 15.

October 14, 1912.

Mr. Frederick L. Allen,
General Solicitor,
Mutual Life Ins. Co. of New York,
New York City, N. Y.

DEAR SIR:

Your favor of the 8th inst. duly received. I enclose letter signed by Mrs. Mary S. Liebing, formerly wife of Frederick W. V. Blees, and also her affidavit, both in accordance with your letter of the 8th inst.

Hope both are in proper form.

Yours truly,

J. J. O'DONOHOE.

Plaintiff's Exhibit 16 is in words and figures as follows:

PLAINTIFF'S EXHIBIT 16.

New York, October 17, 1912.

Mr. James J. O'Donohoe,
509 Chestnut Street,
St. Louis, Mo.

DEAR SIR:

Policy No. 1,207,072—Blees.

Referring to your favor of the 14th inst., we beg to state that we are having photographs made of the papers that you request, and will forward them in a few days, through our manager at St.
220 Louis, who will collect from you the charges necessary, which will be nominal, for the photographs to be made.

FREDERICK L. ALLEN,
General Solicitor.

Plaintiff's Exhibit 17 is in words and figures as follows:

PLAINTIFF'S EXHIBIT 17.

October 22, 1912.

Mr. Francis L. Allen,
General Solicitor, Mutual Life Ins. Co.

Mr. O'Donohoe: Francis is a mistake. (Continuing to read.)

55 Cedar Street, New York City, N. Y.

DEAR SIR:

I received from your local office today photographs of policy No. 1,207,072 on the life of F. W. V. Blees, and loan note for the very small sum of one dollar, for which accept thanks. Because only part of the loan was applied to pay premiums, I think, the policy is collectible, less, of course, the loan and interest thereon.

It seems that the wife of the insured signed the loan agreement. Kindly let me know who was the last designated beneficiary. No doubt you will agree with me that the policy should be paid.

Thanking you for an early answer, I am,

Yours truly,

J. J. O'DONOHOE.

The Court: To whom was that letter addressed, Mr. O'Donohoe?

221 Mr. O'Donohoe: It was addressed to Francis L., it should be Frederick L.

The Court: October 22d?

Mr. O'Donohoe: October 22d, 1912.

Plaintiff's Exhibit 18 is in words and figures as follows:

PLAINTIFF'S EXHIBIT 18.

New York, October 25, 1912.

James J. O'Donohoe, Esq.,
Attorney at Law,
509 Chestnut Street,
St. Louis, Mo.

DEAR SIR:

Policy No. 1,207,072—Blees.

We acknowledge receipt of your letter of the 22nd instant, and would state that there will be a delay of a few days as other departments are concerned, and data has to be obtained.

Very truly yours,

FREDERICK L. ALLEN,
General Solicitor.

Plaintiff's Exhibit 19 is in words and figures as follows:

222 PLAINTIFF'S EXHIBIT 19.

New York, October 30, 1912.

James J. O'Donohoe, Esq.,
Attorney at Law,
509 Chestnut Street,
St. Louis, Mo.

DEAR SIR:

Policy No. 1,207,072—Blees.

Referring to your favor of the 22nd instant, we beg to state that Policy No. 1,207,072 is a 5% gold bond for $50,000, issued September 29th, 1901, and premiums are paid to September, 1905.

The policy contained a table of guaranteed cash surrender values, beginning with the end of the third year. The guaranteed cash surrender value at the end of the fourth year, $9,550. The loan made by the company maturing in 1905 was for the full cash value of $9,550, and the policy was surrendered for non-payment of the loan when it fell due.

It will be seen that there was no equity and that the full cash value as guaranteed by the contract was loaned by the company, so that there was no possible basis for the continuation of the loan, excepting by payment of the premium on the policy and the interest on the loan when it fell due. As this was not done, there does not appear to be any legal claim against the company in connection with this case. The policy was payable to the insured; his exe-
cutors, administrators or assigns, but was assigned by an in-
223 strument in writing to May S. Blees, March 2nd, 1894.

Mr. O'Donohoe: That must be a mistake.
Mr. Holliday: That is an error: 1904.
Mr. O'Donohoe (continuing): 1904.

Yours very truly,

FREDERICK L. ALLEN,
General Solicitor.

Plaintiff's Exhibit 20 is in words and figures as follows:

PLAINTIFF'S EXHIBIT 20.

November 2, 1912.

Mr. Frederick L. Allen,
General Solicitor, Mutual Life of N. Y.,
55 Cedar street, New York City, N. Y.

DEAR SIR:

Mr. Holliday: Now, before Mr. O'Donohoe reads this letter, I want to make particular objection to it, your Honor, on the ground

it is incompetent and irrelevant, improper, inadmissible in this case, because containing self-serving declarations and statements, a discussion of law.

The Court: Overruled.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

Mr. O'Donohoe (continuing to read):

Your favor of the 30th ult., in reference to policy 1,207,072 on the life of F. W. V. Blees, duly received, for which I thank you. Kindly let me have a copy, at my expense, of the assignment of the
224 policy to my client.

I cannot agree with you that the policy is of no value; to the contrary, I think Mrs. Liebing is entitled to the face of the policy, interest, damages and attorney's fees, less the loan and interest, forborne premiums and interest.

As I understand, of the $9,550 there was $4,790.50 given insured outright and $4,291.50 was applied to pay premiums, and $468 was applied to the payment of interest. If I am in error on this, I hope you will set me right.

This is a Missouri contract and governed by her laws, and her non-forfeiture laws are as much a part of the policy as if copied into it.

Cravens v. Ins. Co., 148 Mo., l. c. 604, 170 U. S. 389;
Reed v. Painter, 129 Mo. 680;
Havens v. Ins. Co., 123 Mo., l. c. 417;
Brine v. Ins. Co., 96 U. S. 858.

Since this policy was issued before the amendatory act of 1903 (Laws 1903, page 208), the $4,790.50 cannot be deducted from the net value of the policy nor diminish the extended insurance thereunder. It is well-established law of this State that only that part of the loan made to pay "past premium payments" will be considered in calculating the period of extended insurance under the policy.

Smith v. Ins. Co., 172 Mo. 329;
Burridge v. Ins. Co., 211 Mo. 158;
Paschedag v. Ins. Co., 155 Mo. App. 185;
Head v. Ins. Co., 147 Southwestern (Mo.) 827 (opinion adopted as the opinion in banc, March 21, 1912).

225 According to the actuaries from whom I have taken advice, if the $4,790.50 is not considered the policy is extended beyond the decease of the insured.

The section of the non-forfeiture statute on exceptions does not apply, because, according to the actuaries, neither the cash surrender value nor the paid-up value is equal to that provided for by said non-forfeiture statute, and, furthermore, neither is unconditional.

Price v. Ins. Co., 43 Mo. App. 281;
Whittaker v. Ins. Co., 133 Mo. App. 664.

There is no question, I think, but Mrs. Liebing is entitled on contest to damages and attorney's fees.

Section 8012, R. S. Mo. 1899;
Kellogg v. Ins. Co., 135 Mo. App. 391;
Utz v. Ins. Co., 139 Mo. App. 153;
Williams v. Ins. Co., 189 Mo. 70;
Keller v. Ins. Co., 198 Mo. 440.

The last case under this head decided in this State, I think, is a small one in which I represented the plaintiff, and the award of attorney's fees and damages was sustained.

Welsh v. Ins. Co., 147 S. W. 147.

I am of the opinion that the case is one that should be adjusted. Kindly let me hear from you at an early date, for the reason that if we cannot amicably adjust the same, I desire to bring suit to the next term of court.

Your truly,

J. J. O'DONOHOE.

226 Mr. Holliday: Now, if your Honor please, I move to strike out that letter, and the jury be instructed to disregard it for the reasons given in the objection.

The Court: Overruled.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

Plaintiff's Exhibit 21 is in words and figures, as follows:

PLAINTIFF'S EXHIBIT 21.

New York, November 6, 1912.

Policy No. 1,207,072—Blees.

The Court: I understand these letters are offered now to show vexatious delay?

Mr. O'Donohoe: Yes, your Honor.

The Court: Proceed.

Mr. O'Donohoe (continuing to read letter):

Paid Surrender 1905.

James J. O'Donohoe, Esq.,
Attorney at Law,
701 Houser Bldg., 509 Chestnut St.,
St. Louis, Mo.

DEAR SIR:

We acknowledge receipt of your letter of the 2nd instant, and beg to state that we are looking further into this matter and you will hear from us again in a few days.

Very truly yours,

FREDERICK L. ALLEN,
General Solicitor.

227 Plaintiff's Exhibit 22 is in words and figures as follows:

PLAINTIFF'S EXHIBIT 22.

November 21, 1912.

Mr. Frederick L. Allen,
General Solicitor,
Mutual Life of New York,
55 Cedar Street, New York City, N. Y.

DEAR SIR:

You wrote me a letter under date of 6th inst., in reference to policy No. 1,207,072 on the life of F. W. V. Blees in which you stated "you will hear from us again in a few days."

Please advise us by return mail, if convenient, your decision in this claim.

Yours truly,

J. J. O'DONOHOE.

Plaintiff's Exhibit 23 is in words and figures as follows:

PLAINTIFF'S EXHIBIT 23.

New York, November 23, 1912.

James J. O'Donohoe, Esq.,
Attorney at Law,
509 Chestnut Street,
St. Louis, Mo.

DEAR SIR:

Policy No. 1207—Blees.

(Surrendered 1905.)

Referring to your letter of the 2nd instant and our reply of the 6th instant, I beg to advise that since writing you we have given very careful consideration to the claim made by Mrs. Liebing.

your client, and are of the opinion that the company is not legally liable for any additional sum under the policy referred to. While there are certain decisions of some of your courts which tend to the opposite conclusion, there is no decision of the Supreme Court of Missouri conclusively deciding the points arising in the present case. The company must, therefore, decline to recognize any liability to your client under the said policy.

228

Very truly yours,

FREDERICK L. ALLEN,
General Solicitor.

Plaintiff's Exhibit 24 is in words and figures as follows:

PLAINTIFF'S EXHIBIT 24.

New York, December 4, 1912.

James J. O'Donohoe, Esq.,
Houser Building,
St. Louis, Mo.

DEAR SIR:

Blees v. Mutual Life.

Policy No. 1,207,072—Blees.

I beg to acknowledge receipt of your favor of the 26th ult., in reference to the above. My time has been so fully occupied in connection with the taking of testimony in a pending suit that I was not able to make an earlier reply to your letter. I do not wish to seem to be at all discourteous, but I do not feel that it would be proper for me to consent that an appearance be entered for the December, 1912, Term. I have gone into the matter far enough to satisfy myself that there is a good legal defense; however, I would not wish the case to be pressed and we be obliged to prepare our pleadings without the consideration of all questions involved.

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Very truly yours,

FREDERICK L. ALLEN,
General Solicitor.

HENRY G. SELLMAN, being first duly sworn by the clerk to tell the truth, the whole truth and nothing but the truth, testified on behalf of the plaintiff as follows:

Direct examination.

By Mr. O'Donohoe.

Q. What is your name?
A. Henry G. Sellman.
Q. What is your business?
A. Actuary.

Q. For whom?
A. International Life Insurance Company.
Q. Of this city?
A. Yes, sir.
Q. How long have you been an actuary?
A. Been a student and practicing about twelve or thirteen years.
Q. Are you familiar with Sections 7,897, 7,898 and 7,899 of the Revised Statutes of the State of Missouri, 1899?
A. Yes, sir.
Q. Are you able to make computation of the net value of policies under those sections and to calculate the extended insurance as provided for by said sections?
A. I am.
Q. I show you the policy in suit and ask you to state on what plan it is?
A. This is a ten-payment, twenty-year distribution gold bond policy.
230 Q. Are you familiar with the actuaries or combined experience Table of Mortality?
A. Yes, sir.
Q. Are you familiar with the American Experience Table of Mortality?
A. I am.
Q. Can you make calculations under those tables?
A. Yes, sir; I can.
Q. Now, in calculating the net value of a policy, according to the actuaries or combined experience table of mortality, and according to the American Experience Table of Mortality, with given rates of interest per annum, what factors enter into your calculations; what data are necessary for you to have on a ten-payment life, twenty years distribution policy, such as the one in suit?

Mr. Holliday: Now, if your Honor please, at this point I wish to make objection to further testimony along this line from Mr. Sellman, the actuary; and my objection is based on the following grounds: That the decision in this case rendered by the Supreme Court of Missouri en banc, on November 27th, 1918, and reported in the 207 Southwestern Reporter, at page 230, constitutes the law of this case for the purpose of this trial; that by said decision the sole issue remaining in the case is whether or not they have complied with the terms of the loan agreement, and conformed to the laws of New York, in the cancellation of the policy and the extinguishing of the loan indebtedness, the Court having expressly ruled in said decision that the loan agreement was a New York contract and governed by the laws of New York; that any evidence not bearing on this issue is incompetent, irrelevant and immaterial, and furthermore, that any attempt to recover in this case under the provisions of Section 7,897 of the Revised Statutes of Missouri, 1899,
231 or under such a construction of said statute as would deprive the defendant of the benefit of the terms of said loan agreement made in New York and governed by the laws of New York would be to deprive the defendant of the equal protection of laws,

in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and deprive the defendant of its right to make contracts, its property right to make contracts, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and would deprive the defendant of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States; and that so to construe said Section 7,897 of the Revised Statutes of Missouri, 1899, as to make it apply to or govern the facts in the case at bar would be to deny full faith and credit to the public acts, records and judicial proceedings of the State of New York, in violation of Section 1 of Article IV of the Constitution of the United States; furthermore, without waiving the points already made in this objection, defendant further contends that if any Missouri law is applicable to the facts in the case at bar, it would be said Section 7,897 of the Revised Statutes of Missouri, 1899, as amended by the Act of 1903, under which the defendant was entitled to deduct the entire indebtedness on this policy from three-fourths of the net reserve, and that to deny the defendant the benefit of the application of said section as amended by said Act of 1903, would be to deny to the defendant the equal protection of the laws, and to deprive the defendant of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution
232 of the United States; furthermore, even if the Missouri non-forfeiture laws could be held to apply in this case, and without waiving the points made in this objection, it also appears from the facts in this case that a condition of the insurance other than the non-payment of the premium had been violated, namely, that there was a loan on this policy which had not been paid, and that, therefore, under the non-forfeiture laws of the State of Missouri, if applicable, this plaintiff is not entitled to extended insurance.

The Court: Your first objection is the same general objection made throughout the case, I understand?

Mr. Holliday: Yes.

The Court: The second one has been disposed of by Judge Blair in the 269th Missouri, holding that the Session Acts of 1903 were not applicable, could not affect a policy issued under section 7897, I understand; the objection will be overruled.

To which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

Mr. O'Donohoe: Read the question.

Mr. Holliday: I would like to have it understood, your Honor, have the record show this objection is made to all the testimony of Mr. Sellman.

The Court: All the way through.

(Thereupon the Reporter read the question, as follows: Q. Now, in calculating the net value of a policy, according to the actuaries' or combined experience table of mortality, and according to the

American experience table of mortality, with given rates of
233 interest per annum, what factors enter into your calculations, what data are necessary for you to have on a ten-payment life, twenty-years' distribution policy, such as the one in suit?)

The Witness: It would be necessary to have the date of issue of the policy, the age of the insured at date of issue, and the amount of insurance covered under the policy.

Mr. O'Donohoe:

Q. Then, under either the actuaries' or combined experience table of mortality, or under the American experience table of mortality, if you are given the date of issue, the age of the insured at date of issue, the date of lapse, and the age of the insured at date of lapse, together with the amount of the insurance, can you compute the net value of the ten-payment life, twenty-year distribution plan policy, and the net value of policies on other plans?

A. Yes, sir.

Q. What is the net value of a policy in the sum of $65,250, where it was issued at age 41 years, the policy being, as you stated, a ten-payment life, twenty-year distribution plan policy, where premiums were paid four years, where the lapse occurred after the payment of such premiums, computed from the actuaries' or combined experience table of mortality at the rate of four per cent per annum, and computed at age 45?

A. The value of such a policy, the net value would be $11,230.83.

Q. Is that the net value of the policy in suit?

A. It is.

Q. What is three-fourths of that net value?

A. Eight thousand, four hundred twenty-three dollars and twelve cents.

234 Q. Deduct $4,759.50, which represents the premium and interest from $8,423.12, which represents three-fourths of the net value of the policy, and what is the remainder?

A. Three thousand, six hundred sixty-three dollars and sixty-two cents.

Q. What length of time would the remainder, $3,663.62, taken as a net single premium for temporary insurance for the full amount of $65,250, calculated at age 45 on the actuaries' or combined experience table of mortality, with interest at the rate of four per cent per annum, carry the policy?

A. It would carry it four years, nine months, and eighteen days.

Q. What is the net value of the policy in suit, assuming the insured, age 41 years, at date of issue, and assuming also that four annual premiums were paid on the policy computed at age 45 years—I will recall that; I think that question is already answered—just strike that out.

Q. What sum, taken as a net single premium for temporary insurance for the full amount of $65,250, on a ten-payment life, twenty-year distribution plan policy, computed at age 45 years, on the actuaries' or combined experience table of mortality, with

interest at the rate of 4 per cent per annum, would carry the policy eleven months and eleven days?

A. Seven hundred fifteen dollars and seventy-nine cents.

Q. What sum, taken as a net single premium for temporary insurance for the full amount of $65,250, on a ten-payment life, twenty-year distribution plan policy, computed at age 45 years on the American experience table of mortality, at 4½ per cent interest per annum, would carry such policy eleven months and eleven days?

235 Mr. Holliday: Objected to as incompetent, irrelevant and immaterial under any of the issues in this case, or under any of the contentions contained in the pleadings of the plaintiff.

The Court: Same objection; same ruling.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

Mr. O'Donohoe:

Q. What is your answer?

A. Six hundred fifty-one dollars and four cents.

Q. What sum, taken as a net single premium for temporary insurance for the full amount of $65,250, on a ten-payment life, twenty-years distribution plan policy, computed at age 45 years, on the American Experience Table of Mortality, with 3½ per cent interest per annum, would carry the policy eleven months and eleven days?

Mr. Holliday: Same objection.

The Court: Same ruling.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

The Witness:

A. Six hundred fifty-seven dollars and seventy-two cents.

Mr. O'Donohoe:

Q. What sum, taken as a net single premium for temporary insurance for the full amount of $65,250, on a ten-payment life, twenty-years distribution plan policy, computed at age 45 years, on the American Experience Table of Mortality, with 3 per cent

236 interest per annum, would carry the policy for eleven months and eleven days?

Mr. Holliday: Same objection.

The Court: Same ruling.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

The Witness:

A. Six hundred sixty dollars and eighty-three cents.

Mr. O'Donohoe:

Q. What is the net value of a policy or $65,250, issued at age 41 years, the policy being a ten-payment life, twenty-years' distribution plan policy, on which premiums were paid for four years, where the lapse occurred after the payment of said four years' premiums, computed at age 45 on the actuaries' or combined experience table of mortality, with 4 per cent interest per annum?

Mr. Holliday: I think that question——

The Witness:

A. That has been previously answered.
The Court: Yes, that was answered, $715——

The Witness:

A. No; $11,230.83.
The Court: Yes, that is answered.
Mr. O'Donohoe: Oh, yes; that's already answered.
The Court: Eleven thousand two hundred thirty dollars and eighty-three cents.

Mr. O'Donohoe:

Q. What is the net value of a policy of $65,250, issued at age 41 years, the policy being a ten-payment life, twenty-years' distribution plan policy, on which premiums were paid for four years, and where the lapse occurred after the payment of said four years'
237 premiums, computed at age 45, on the American Experience Table of Mortality, with interest at the rate of 4½ per cent per annum?

Mr. Holliday: Also objected to as incompetent, irrelevant and immaterial under any of the issues in this case.
The Court: Same ruling.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

The Witness:

A. Nine thousand eight hundred eighty-one dollars and forty-six cents.

Mr. O'Donohoe:

Q. What is the net value of a policy of $65,250, issued at age 41 years, the policy being ten-payment life, twenty years' distribu-

n plan policy, on which premiums were paid for four years, and ere the lapse occurred after the payment of said four years' prem-ns, computed at age 45, on the American Experience Table of rtality, with interest at the rate of 3½ per cent per annum?

Mr. Holliday: Same objection.
The Court: Same ruling.

Which objection was by the Court overruled; to which action and ling of the Court defendant, by its counsel, then and there duly jected and excepted and still objects and excepts.

The Witness:

A. Eleven thousand nine hundred forty-seven dollars and ninety-ree cents.

Mr. O'Donohoe:

Q. What is the net value of a policy of $65,250, issued at age 41 years, the policy being a ten-payment life, twenty years 238 distribution plan policy, on which premiums were paid for four years, where the lapse occurred after the payment of aid four years' premiums, computed at age 45, on the American Experience Table of Mortality with interest at the rate of 3 per cent per annum?

Mr. Holliday: Same objection.
The Court: Same ruling.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

The Witness:

A. Thirteen thousand one hundred ninety-one dollars and fifty-nine cents.

Mr. O'Donohoe:

Q. What is the cash value of a paid-up policy of $522, calculated at age 45, on the American Experience Table of Mortality, with 3 per cent interest per annum?

Mr. Holliday: Just a moment. May I hear that question read?

(Thereupon the reporter read the question, as follows: Q. What is the cash value of a paid-up policy of $522, calculated at age 45, on the American Experience Table of Mortality, with 3 per cent interest per annum?)

Mr. Holliday: I object to that question as incompetent, irrelevant and immaterial under any of the issues in this case, and, furthermore, as calling for a contradiction of terms, viz., the cash value of a paid-up policy.

Mr. O'Donohoe: The point is this, your Honor: That they had in their hands a sum belonging to this plaintiff larger than they got—from the policy itself; their policy stipulated for the
239 payment of $522 paid-up insurance, which was of greater value than the cash surrender value of $191, consequently they could not confiscate a thing of greater value for a less sum.

Mr. Holliday: Well, the answer to that contention is perfectly obvious. The policy stated what the cash surrender value was at the end of four years; it was $191 for each $1,000 bond, that is, fifty times that, $9,550; that was on the face of the policy when issued to Mr. Blees, and he accepted it. The plaintiff in this case, his assignee, accepted that policy with that agreement in it, which is the first proposition. The second proposition is, when they came to execute the loan agreement, they again expressly agreed that that was the cash surrender value of this policy, $9,550, so that was a matter of agreement in the policy at the time it was issued; and it was again embodied in the loan agreement when it was signed by Mr. Blees and his wife; but, aside from that, the fact that the policy contained other conditions, that is, it contained the usual provision for extended insurance, for paid-up insurance, and for a cash surrender value, does not permit of trying to figure back from the paid-up policy, which was not issued in this case, was not demanded in this case, to determine a different cash surrender value from that which was agreed upon by the parties and expressly stated in the policy; in other words, nobody here contends that they ever asked for a paid-up policy in this case, or that they could have gotten one if they asked for it, because the policy expressly states on its face no paid-up insurance will be issued if there is an unpaid loan on the policy.

240 The Court: This is done, as I understand, in connection or pursuant to Section 7897?

Mr. O'Donohoe: Yes, your Honor.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

Mr. O'Donohoe:

Q. What is your answer?

A. The net value of $522 of paid-up life insurance, at age 45, on the American Experience Table of Mortality, with 3 per cent interest per annum, is $263.40.

Mr. Holliday: Now, if your Honor please, I move that the answer of the witness be stricken out, or that the question be so amended as to show the true state of facts. The actuary has answered the net value of paid-up insurance is a certain amount. The question was what was the cash value; and that is what I particularly object to. There is no question of cash——

The Court: The question was cash value.

Mr. O'Donohoe: Yes, your Honor.

The Witness: The equivalent cash value would be, as stated, $263.40.

Mr. Holliday: Now, I move that that answer be stricken out.

The Witness: The cash value, well, say, the cash value——

Mr. Holliday: What was that?

The Witness: Well, I will say the cash value of the policy of $522, of paid-up life insurance, is $263.40.

Mr. Holliday:

Q. What do you mean by the term "cash value"?

241 A. The equivalent value in dollars for the paid-up insurance of $522.

Q. You mean to testify that paid-up insurance is the same thing as the cash value of a policy?

A. No, sir; $522 of paid-up life insurance, at age 45, computed on the American Experience Table of Mortality, with interest at 3 per cent., if expressed in dollar values, the present equivalent dollar value of that insurance is $253.40.

Q. Oh, yes; you say that is expressed——

A. As—well, expressed in dollars, put it.

Q. What if the policy has a definite statement in it as to what the cash surrender value is; then, that is the cash surrender value of that policy, isn't it?

Mr. O'Donohoe: Your Honor please, we are not on cash surrender values; we are on paid-up values.

Mr. Holliday: That is, he is asking what the cash surrender value is, and I am objecting to this testimony.

Mr. O'Donohoe: I am not asking what the cash surrender value is; I am asking what the cash value of paid-up insurance is.

Mr. Holliday: I renew my objection to all this line of testimony—absolutely out of place in this case; there never has been any contention that any paid-up insurance was requested or demanded in this case.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

Mr. O'Donohoe:

Q. One hundred ninety-one dollars would not purchase $522

242 of paid-up insurance on a life, age 45?

Mr. Holliday: I object to that question for all the same reasons heretofore advanced.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted, and still objects and excepts.

The Witness: On the basis of the American Experience Table of Mortality, with interest at 3 per cent, it would not.

Mr. O'Donohoe:

Q. It would not. What is the cash value of a paid-up policy of $522, calculated at age 45, on the American Experience Table of Mortality, with 3½ per cent interest per annum?

Mr. Holliday: Same objection to that question.
The Court: Same ruling.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

The Witness: The equivalent cash value is $223.71.

Mr. O'Donohoe:

Q. What is the cash value of a paid-up policy for $522, calculated at age 45, on the actuaries' or combined experience table of mortality, with interest at the rate of 4 per cent per annum?

Mr. Holliday: Same objection.
The Court: Same ruling.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

243 The Witness: The equivalent cash value is $223.71.

Mr. O'Donohoe:

Q. What is the net value of a policy of $65,250, issued age 41 years, the policy being a ten-payment life, twenty years distribution plan policy, on which premiums were paid for three years, and where the lapse occurred after the payment of said three years' premiums, computed at age 44, on the actuaries' or combined experience table of mortality, with interest at the rate of 4 per cent per annum?

Mr. Holliday: Same objection.
The Court: Same ruling.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

The Witness: Eight thousand, two hundred thirty-nine dollars and seventy-seven cents.

Mr. O'Donohoe:

Q. Deduct the sum of $4,790.50, which represents the amount Blees and plaintiff received from the defendant, on a loan of $9,550, from $8,239.77; what is the remainder?

Mr. Holliday: Same objection.
The Court: Same ruling.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

A. Three thousand, four hundred forty-nine dollars and twenty-seven cents.

Mr. O'Donohoe:

Q. What is the net value of a policy of $65,250 issued at age
244 41 years, the policy being a ten-payment life, twenty-year distribution plan policy, on which premiums were paid for three years, and where the lapse occurred after the payment of said three years' premiums, computed at age 44, on the American experience table of mortality, with interest at the rate of 4½ per cent per annum?

Mr. Holliday: Same objection.
The Court: Same ruling.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

A. Seven thousand, two hundred twenty-nine dollars and seventy cents.

Mr. O'Donohoe:

Q. Deduct the sum of $4,790.50, which represents the amount Blees and plaintiff received from the defendant out of the loan of $9,550, from $7,229.70; what is the remainder?

Mr. Holliday: Same objection.
The Court: Same ruling.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

A. Two thousand, four hundred thirty-nine dollars and twenty cents.

Mr. O'Donohoe:

Q. What is the net value of a policy of $65,250, issued at age 41 years, the policy being a ten-payment life, twenty-year distribution plan policy, on which premiums were paid for three years, where the lapse occurred after the payment of said three years' pre-
245 miums, computed at age 44, on the American experience table of mortality, with interest at the rate of 3½ per cent per annum?

Mr. Holliday: Same objection.
The Court: Same ruling.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

A. Eight thousand, seven hundred eighty-one dollars and thirty-five cents.

Mr. O'Donohoe:

Q. Deduct the sum of $4,790.50, which represents the amount Blees and plaintiff received from defendant, out of the loan of $9,550, from $8,781.35; and what is the remainder?

A. Three thousand, nine hundred ninety dollars and eighty-five cents.

Q. What sum, taken as net single premium for temporary insurance for the full amount of $65,250, on a ten-payment life, twenty-year distribution plan policy, computed at age 44, on the actuaries' or combined experience table of mortality, with 4 per cent interest per annum, would carry such a policy for one year, eleven months, and eleven days?

Mr. Holliday: I object to that question, because that is entirely outside the issues of the case—even under section 7897, because that section provides for figuring from the date of lapse, age 45; anybody asking for figures, at age 44, while the policy was still in force, that is obviously not competent in this case.

Mr. O'Donohoe: The point, your Honor, is this: That Blees and the plaintiff received out of this loan this sum only, which, if
246 deducted from the net value of the policy at that time—all of it deducted—it would still leave a balance sufficient for use as net single premium, as commanded by the non-forfeiture statutes of Missouri, to carry it beyond the death of the insured.

The Court: That is the purpose of it?

Mr. O'Donohoe: That is the purpose, your Honor.

The Court: He may answer.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

A. One thousand four hundred thirteen dollars ninety-seven cents.

Mr. O'Donohoe:

Q. Fourteen hundred and what?

A. Thirteen dollars, ninety-seven cents.

Q. What sum, taken as a net single premium for temporary insurance, for the full amount of $65,250, on a ten-payment life, twenty years distribution plan policy, computed at age 44, on the American Experience table of mortality, with interest at the rate of 3½ per cent per annum, would carry such a policy for one year, eleven months, eleven days?

Mr. Holliday: Same objection; and the additional ground that the table now attempted to be used is not specified in the Missouri non-forfeiture law at all.

The Court: He may answer.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

247 A. One thousand three hundred twelve dollars eighteen cents.

Mr. O'Donohoe:

Q. What sum, taken as a net single premium for temporary insurance for the full amount of $65,250, on a ten-payment life, twenty years distribution plan policy, computed at age 44, on the American Experience table of mortality, with interest at the rate of 4½ per cent per annum, would carry such policy one year, eleven months, eleven days?

Mr. Holliday: Same objection.

The Court: Same ruling.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and saill objects and excepts.

A. One thousand *twenty* hundred ninety-two dollars forty-nine cents.

Mr. O'Donohoe:

Q. One thousand two hundred ninety-two?

A. One thousand two hundred ninety-two dollars forty-nine cents.

Q. What is the amount of a gross or office premium, on an ordinary life policy per thousand, issued at age 41 years, calculated on the American Experience table of mortality, with interest at the rate of 3½ per cent per annum?

Mr. Holliday: I object to that question; it is utterly immaterial; incompetent under any of the issues in this case, for the reason, in the first place, that the question is not confined to the terms of the non-forfeiture laws of the State of Missouri, even if such were applicable; and, second, it is the policy in suit, not an ordinary life policy; the witness himself says ten-pay, twenty-year distri-
248 bution policy; third place, of course, whatever it is it has no place at present under the issues in this case.

The Court: He may answer.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

A. This—an ordinary life gross premium might be a different amount; I have a memorandum here which—my recollection is that it was a former Mutual Life rate, shows $32.48 per thousand.

Mr. Holliday: Well, I move that the answer of the witness be stricken out as not based on facts.

Mr. O'Donohoe: Well, I will withdraw that question.

Q. Is the amount of a gross annual premium on an ordinary life policy as great, or greater, computed on the American Experience Table of Mortality, at 3½ per cent interest per annum, or on the actuaries' or combined experience table of mortality, at the rate at 4 per cent?

Mr. Holliday: I object to that for the same reasons heretofore given; utterly incompetent, irrelevant, in this case.

The Court: He may answer.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

A. Assuming the same basis of calculation, a gross premium on the actuaries' 4 per cent table would be greater than a
249 gross premium computed on the American 3½ per cent table.

Mr. Holliday: I move that the answer of the witness be stricken out as based on an assumption or guess.

The Court: It may stand.

Which objection was by the Court overruled: to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

Mr. Donohoe:

Q. Are you not mistaken on that calculation?

A. The two tables were the American 3½ and the actuaries' 4, were they not?

Q. Sir?

A. The two tables mentioned in your question were the American 3½ and the actuaries' 4?

Q. Yes.

A. Assuming the same basis of calculation, the gross premium on the basis of actuaries' 4 per cent table, would be greater than the gross premium computed on the American 3½.

Mr. Holliday: I move again that the answer be stricken out as showing it is based on assumption, or guess of the witness.

The Court: It may stand.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

Mr. O'Donohoe:

Q. What is the amount of a gross annual ordinary life premium per thousand on an ordinary life policy, calculated at age 45 years, on the American experience table of mortality, with interest at the rate of 3½ per cent per annum?

250 Mr. Holliday: Objected to as incompetent, irrelevant and immaterial under any of the issues in this case.

The Court: Same ruling.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

The Witness: Will you repeat the question, please?

Thereupon the Reporter read the question, as follows:

Q. What is the amount of a gross annual ordinary life premium per thousand on an ordinary policy, calculated at age 45 years, on the American experience table of mortality, with interest at the rate of 3½ per cent per annum?

The Witnesss: I can't answer that question unless for a specific company.

Mr. O'Donohoe:

Q. Sir?
A. I could only answer that for a specific compauy, and if I had the rates of that company before me; a gross premium is a matter of calculation which may be determined by the individual company.
Q. You mean, if the loading is different?
A. The loading is different, the gross premium would therefore be different.
Q. What do you mean by loading?
A. Loading is the expense margin in the policy above the net, the mathematical net premium.
Q. Well, what is the usual loading?

Mr. Holliday: Now, I object to that as absolutely incompetent, immaterial, rather improper, to say what is the usual loading;
251 the witness has testified he can't answer these questions unless he knows the practice and figures used by each company.
The Court: Unless he knows.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

A. Well, there is such a wide range of variation there that it would be impossible for me to make an answer that would be sufficiently general according to the company.

Mr. O'Donohoe:

Q. Assuming the loading to be the same, I ask you again, which table, the American Experience table of mortality, with interest at the rate of 3½ per cent per annum, or the actuaries or combined

experience table of mortality with interest at the rate of 4 per cent, requires the higher gross premium.

Mr. Holliday: I again object to that question, not only on all the grounds heretofore given in objecting to this line of testimony, but because the witness has just stated he cannot give an answer to this particular line of questions without knowledge of facts, the basis used by the particular company.

The Court: He may answer if he can.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

The Witness: Assuming the same loading, the gross
252 premium for an ordinary life policy at age 41——

Mr. O'Donohoe:

Q. No, at age 45.

A. At age 45 would be greater, computed on the actuaries or combined experience table at 4 per cent than on the American 3½ per cent.

Q. Well, which premium, the one calculated on the American Experience 3 per cent per annum, or the one calculated on the actuaries or combined experience table of mortality, at 4 per cent per annum, is the greater?

Mr. Holliday: Same objection.

The Court: Same ruling.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

A. Assuming the same basis of loading, the gross premium computed on the American 3 per cent would be greater than computed on the actuaries 4 per cent.

Mr. O'Donohoe:

Q. You say that under the American Experience 3 per cent it would be higher than under the actuaries or combined at 4 per cent per annum?

A. Yes, sir.

Q. Can you approximate the amount of the gross premium on an ordinary life policy, calculated at age 45 on the actuaries or combined experience table of mortality at 4 per cent interest per annum?

Mr. Holliday: I object to that question as incompetent, irrelevant and immaterial, and calling for the guess of the witness, and inapplicable in this case when the policy was not an ordinary life policy, but a ten-payment life policy.

253 The Court: He may answer.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

The Witness: I could make a comparison of a gross premium on an American 3, and a gross premium on the actuaries' 4, assuming a specific loading, if that would be of any assistance.

Mr. O'Donohoe:

Q. Well, I shall ask you to do that.

Mr. Holliday: I object to that being done; showing clearly that it is entirely an assumption, a guess of the witness; not based on any facts with the rates used by the Mutual Life; not in any way competent under the issues in this case.

The Court: He may answer.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

Mr. Holliday: As a further reason why, your Honor, all these questions, and the last one in particular, in regard to gross premium, are utterly irrelevant, is because Mr. O'Donohoe requested from the defendant company a statement as to what its gross premiums were at the time this policy was issued, and got a letter from Mr. Jackson in January, 1917, stating exactly what they were, and he read that letter in evidence here yesterday, so why any assumption or computation or guess of this witness is relevant in this case, is beyond my comprehension.

254 Mr. O'Donohoe: The statute requires, your Honor, plaintiff be given credit for the premium on the basis of an ordinary life premium, and calculated on the actuaries' or combined experience table of mortality at 4 per cent interest per annum; the table used by the defendant company as given to us was, I think, calculated on the American experience 3½, and, of course, that would not meet the requirements of the statute.

Q. Mr. Sellman, I wish you would make your calculations at age 41, instead of age 45?

A. Yes, sir. I have computed an annual premium at age 41, on the American Experience table at 3 per cent interest, assuming a loading of 10 per cent, would give a gross premium of $28.18; assuming the same loading, and computing an ordinary life premium at age 41 on the actuaries' or combined experience table of mortality at 4 per cent, I have a gross premium of $27.05. The assumption of the 10 per cent loading is an arbitrary assumption on my part.

Q. Well, will you say the sum of $34.16, calculated under any table, would be enough for an ordinary life premium where the policy is issued at age 41?

Mr. Holliday: That is objected to for all the reasons heretofore given.

The Court: Same ruling.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

A. It is my opinion that it would be; yes, sir.

Mr. O'Donohoe:

Q. What is meant by the gross or office premium?

255 A. Gross premium is the mathematical net premium, plus an addition, called the expense loading, to provide for operating expenses.

Q. What are the elements of a gross premium?

A. Reserve, mortality contribution and expense loading.

Q. What do you mean by the reserve?

A. The reserve is the amount set aside out of the premium paid by the insured to accumulate in order to provide for the increase in mortality in future years.

Q. Now, what do you mean by mortality contribution?

A. The mortality contribution is the amount out of the current annual premium which is apportioned to pay the current mortality or the current claims under the policies on account of death.

Q. And expense loading, what do you mean by that?

A. Expense loading is the margin provided in the gross premium to take care of operating expenses, or overhead, expenses.

Q. So that the gross premium is sufficient to set aside a reserve and a sum also to pay death claims and operating expenses of administration or running an insurance business?

A. Yes, sir.

Q. From what fund do the dividends or surplus come?

A. Policy dividends are usually calculated from savings from these three sources, from the excess interest earned on the reserve, from the savings in mortality on account of the actual mortality experienced by the company proving to be less than was anticipated in the calculation of the premium, and in savings in expense of operation over that provided in the expense loading.

Q. Well, is the reserve set aside for the policy holders?

A. Yes, sir.

256 Q. And that reserve is contributed by the policy holders?

A. It is.

Q. It is out of their premiums that that fund is created?

A. That is right.

Q. So that the surplus and dividends is sort of an overcharge in the premium?

Mr. Holliday: Now, I object to that question as leading, in the first place, improper in form; furthermore, that all this testimony that is attempted to be introduced, as to reserve values, surplus values, and so forth, is utterly incompetent, irrelevant and immaterial under any of the facts in this case, or under any of the issues in this case.

The Court: It is leading and suggestive.

Mr. O'Donohoe: Yes; I will withdraw that question.

Q. What is meant by the net single premium for temporary insurance?

A. The net single premium for temporary insurance is the amount of money which the company must have on hand to furnish the surance stipulated for the number of years called for, that is, the temporary insurance is the present value of the amount of insurance which is given for the specific period of years; if it is a thousand dollars for five years, and the table is given, you can compute the present value in dollars of that contingent benefit.

Q. What fund provides for the net single premium for temporary insurance?

A. In the event of a lapse of a policy, the reserve fund.

Q. Reserve fund?

A. Less a surrender charge, is applied to purchase temporary extended insurance, or paid-up life insurance, in accordance with the terms of the policy.

257 Q. You use the term "Surrender charge"; what is the highest sum taken for surrender charge?

A. I could hardly say what was the highest; the statutes of a great many states provide that a surrender charge not to exceed 2½ per cent of the face of the policy may be taken as a surrender charge—that would be $25 per thousand.

Q. Do you know of any surrender charge higher than that?

A. None occurs to me at this time; I don't——

Q. What is meant by surplus, dividends—I will ask you, first, if the word "surplus" and the word "dividend" in the insurance world has the same meaning?

A. No, sir.

Q. What is the difference between them?

Mr. Holliday: I object to all this line of testimony in regard to surplus and dividends, on the ground it is incompetent under the issues in this case; and, furthermore, it is incompetent, irrelevant, under the terms of this policy in suit—stated on its face to be a deferred dividend policy; and there was to be no distribution of surplus until twenty years had elapsed, and then only if all premiums were paid and the insurance still alive.

The Court: He may answer.

Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

A. The free surplus of the company is the amount that is left after all liabilities have been computed, and in the calculation of these liabilities would be included calculation for annual

258 dividends and deferred dividends and any other liabilities which the company might know of; the balance of the company's assets over its known liabilities and computed liabilities is known as its free surplus.

Mr. O'Donohoe:

Q. What do you understand by deferred dividends?
A. A deferred dividend is a dividend that is payable at the end of the period of deferment specified in the policy, and not payable in——
Q. How are they accumulated?
A. Sir?
Q. How are they accumulated?
A. That is a matter of company practice.
Q. Company practice?
A. Yes, sir.

Mr. O'Donohoe: I believe that's all.

Cross-examination.

By Mr. Holliday:

Q. Mr. Sellman, I believe you said you were familiar——

Mr. O'Donohoe: Pardon me just one minute.
Mr. O'Donohoe: I ask that certain calculations which I shall hand the witness be marked "Plaintiff's Exhibit 25."

Thereupon the reporter marked the same "Plaintiff's Exhibit 25."

Q. I show you Plaintiff's Exhibit 25, and ask you to look at it and state whether or not those calculations are correct.
A. I checked the proof on this, these calculations, as well as made the original copy, and they are correct.

Mr. Holliday:

Q. Mr. Sellman, I believe you stated that you were familiar with Sections 7897, 7898, 7899 and 7900 of the Revised Statutes of Missouri, 1899, relating to—being the so-called Missouri non-forfeiture laws?
A. Yes, sir.
259 Q. In the course of your direct examination by Mr. O'Donohoe, you undertook to figure what you called an equivalent cash value of paid-up insurance; in making those calculations did you base them on anything contained in any of those sections of the Missouri statute?
A. I based them on the—probably only to the extent of the table of mortality, the one I believe was the American, the combined 4 per cent table, and that was the table used in calculations of paid-up insurance.
Q. Well, in other words, the statute simply mentions that the calculations required to be made under section 7897 shall be based on that table, that's all; that is the only mention of that table, isn't it?

A. Yes, sir; I think so.

Q. Now, I will ask you to take those sections of the statute and examine them and see if they contain any basis on which you can figure an equivalent cash value of paid-up insurance?

The Court: Seven thousand eight hundred and ninety-eight, isn't it?

A. Seven thousand eight hundred ninety-seven, 98 and 99?

Mr. Holliday:

Q. Yes.

A. I don't think that the statute specifies a basis of calculations in paid-up life insurance.

Q. That's all I wanted to find out, Mr. Sellman, because Mr. O'Donohoe stated that your calculations were offered in support of this statute, under this statute.

Mr. O'Donohoe: Which calculations?

Mr. Holliday: When I made my objections he stated to his Honor that this was proof he was putting in under sections of the non-forfeiture laws.

260 Q. Now, Mr. Sellman, were your calculations or assumption as to what you call the equivalent cash value of paid-up insurance, based on any statute of the State of New York?

A. I don't know as to that; in fact, I don't know as to the statutory basis; I simply made the calculation, the mathematical calculation as to whether it applied as to the laws of Missouri or laws of New York; I——

Q. In other words, you didn't have in mind any statute in New York, providing for a method or means of calculating either extended insurance or paid-up insurance, or what you call a cash equivalent of paid-up insurance?

A. No, sir.

Q. Now, I believe you have made a statement, made a computation under section 7897, and that the total reserve or net value figured under that section, on a policy of the character shown you, at date of lapse, September 29th, 1905, was $11,230.83; is that correct?

A. Yes, sir.

Q. In making that calculation, did you take into consideration that this was a ten-pay life policy, on which only four premiums had been paid?

A. Yes, sir.

Q. And what did you find three-fourths of that to be?

A. Eight thousand four hundred twenty-three dollars and twelve cents.

Q. If you deduct from that sum, the last sum, $8,423.12, the sum is $9,550, does there remain any balance to be applied as a net single premium to carry the policy on extended insurance?

A. There would be no balance to apply to the purchase of extended insurance.

Q. I believe you gave in your direct testimony your figures as to the value of this policy in suit or rather the net reserve on
261 this policy in suit, at the end of the fourth year, computed on the American experience table of mortality, at the rate of 4½ per cent per annum; will you kindly repeat, however, the figure which you gave?

A. Yes, sir; I find the net value of a policy of $65,250, issued at age 41, the policy being a ten-payment life, twenty-year distribution plan policy, on which premiums were paid for four years, computed on the American experience table of mortality, with interest at 4½ per cent, at $9,881.46.

Q. Take two-thirds of that amount, and let us have what that is?

A. Six thousand, five hundred eighty-seven dollars and sixty-four cents.

Q. And if there were an indebtedness on such policy of $9,550, that indebtedness would be greater than this figure, two-thirds of the reserve, net reserve which you have just given us?

A. It would; yes, sir.

Mr. Holliday: I think that's all.

Redirect examination.

By Mr. O'Donohoe:

Q. You gave as the net value of a policy for $65,250, issued at age 41, considering the policy a ten-payment life, twenty-year distribution plan policy, on which premiums were paid for four years, calculated at age 45, on the American experience 3½ per cent, as $11,947.93; is that correct?

A. Yes, sir.

Q. Now, if $9,550 were deducted from that sum, there would be a balance left, would there not?

A. Yes, sir.

Q. Of how much?

A. The amount to be deducted is $9,550?

262 Q. Yes.

A. Two thousand, three hundred ninety-seven dollars and ninety-three cents.

Mr. Holliday: Well, I object to——

The Court: What is the object of that, going into the Sessions Acts of 1903? That has already been held inapplicable.

Mr. O'Donohoe: Nineteen hundred and three—this is the table, your Honor, on which they calculate the gross premium themselves.

The Court: I understand the defendants originally relied upon the Session Acts of 1903; that is, the amendment to the original act. The Supreme Court has held differently in the 269th.

Mr. O'Donohoe: Very well. I believe that's all.

Mr. Holliday: That's all.

Mr. O'Donohoe: I now offer in evidence Plaintiff's Exhibit 25.

Mr. Holliday: I wish to make the same objection to the offering in evidence of these calculations that I did to the testimony of Mr. Sellman.

The Court: Yes, I understand.
Mr. Holliday: Including all the constitutional points.
Mr. O'Donohoe: This is simply a detailed calculation, your Honor, of how the actuary arrived at the figures he has testified to under the Missouri non-forfeiture statute. I won't consume the time of the Court and jury unless you desire, Mr. Holliday, to have it read.
Mr. Holliday: I am objecting to it altogether; I won't ask you to read it.
The Court: Overruled.

263 Which objection was by the Court overruled; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

Said Plaintiff's Exhibit 25 is in words and figures as follows:

PLAINTIFF'S EXHIBIT 25.

Where figures are subscripts they are indicated by *
The net value of $65,250 on the ten-payment life plan issued at age 41 and upon which four premiums have been paid is ascertained as follows:

Net value of $1,000—ten-payment Life Insurance Act. 4%, Age 41, after 4 years' payment	$172.12
	65.25
	86060
	34424
	86060
	103272
(12) Net value of $65,250.00	$11,230.8300
Deduct ¼	2,807.71
(13) ¾ of Net Value	$8,423.12
Deduct	$5,045.07
(14)	$3,378.05

(15) To ascertain the length of time this amount would continue the policy, it has been necessary for me to compute the net single premium for $1.00 of Temporary Insurance for a period of
264 four years and a period of five years at the attained age of the Insured at the end of the fourth policy year, i. e., Age 45. The following formula from the Principles and Practice of Life Insurance, page 53, shows the method of calculating the above:

$$A\ 45:4]^{*} = \frac{M45^{*} - M49^{*}}{D45^{*}}$$

Interpreting these symbols we have A 45:4]* the net single premium for Insurance on a life aged 45 payable in the event the Insured dies within four years is equal to (M45*) the present value of all the claims which will arise on lives surviving to age 45 less M49 the present value of all the claims which will arise on lives surviving to age 49. This amount is divided by (D45*) the present value of one dollar due 45 years hence for each of the persons living at age 45. Applying the formula to the calculation of Temporary Insurance on the Act. Table of Mortality at 4% by referring to pp. 362, 365 of P. & P. of Life Insurance we find the following:

Net Single Premium for 4 Years' Temporary Insurance, at age 45, Act. 4%.

(1)	M45*	5,461.35799
(2)	M49*	4,863.58791
(3)		597.77008
(4)	D45*	12,743.15378
(5)	(3)÷(4)	.046909

This is the Net Single Premium for $1.00 of Insurance
265 Temporary for 4 years at age 45. A similar method is followed in the calculation of Insurance Temporary for 5 years.

(1)	M45*	5,461.35799
(2)	M50*	4,714.01040
(3)		747.34759
(4)	D45*	12,743.15378
(5)		.058646

This is the Net Single Premium for $1.00 of Insurance Temporary for 5 years at age 45. Temporary Insurance for $1.00 for 4 years costs .046909; $65,250 costs $65,250×.046909=$3,060.81. The Amount available to purchase extended insurance—$3,378.05 less $3,060.81=$317.24 unused. One Day's Insurance of $1.00 costs .00003212; $65,250 Insurance costs $65,250 times .00003212=$2.09583. If $65,250 Insurance for one day costs $2.09583, $317.24 will purchase as many days' insurance as $2.09583 will go into $317.24. Dividing 317.24 by 2.09583 we have 151.3 days or 5 months 1.3 days in addition to the 4 years provided above. That is, $3,378.05 will purchase Temporary Insurance of $65,250 at age 45 for 4 years 5 months and 1 day.

(6)	¾ of Net Value as given above is	$8,423.12
Deduct		4,759.50
		$3,663.62

(7) To ascertain the length of time $3,663.62 will continue a policy of $65,250 at age 45 we refer to our prior calculation.
266 Four years extended Insurance costs $3,060.81.

Subtracting from	$3,663.62
The Net Single Premium for 4 years extended insurance.	3,060.81
Balance	$602.81

We showed above that one day's insurance of $65,250 costs $2.09583. Dividing 602.81 by 2.09583=287.6 days or 9 months 18 days. The total period of Extended Insurance purchased by $3,663.62 is 4 years 9 months 18 days.

Thereupon the Court duly and properly admonished the jury as to the proper conduct of its members while court should not be in session, and the Court then took a recess until 2 o'clock p. m. of the same day, May 13, 1919; at which day and hour court was duly reconvened, and the jury being present as before, the following proceedings were had, to wit:

Mr. O'Donohoe: If the Court please, we have subpœnaed a witness, named Fred N. Cheney, and he is out of the city with the consent of both the plaintiff and defendant. We expected to establish by that witness—he was under subpœna through us—that the ordinary life premium per thousand, charged by the defendant company in 1901, on a policy issued at age 41, was the sum of $33.93; and that the witness would testify as follows:

Question. Does your office, Mr. Cheney, include anything other than St. Louis, any portion of the State?

Answer. Yes, we have quite a large part of the State.

Question. What is your territory?

Answer. Well, I can't give you the exact line without a
267 map, but we have——

Question. I will ask you this: Is Macon, Missouri, within your territory?

Answer. Oh, yes; Macon County is in our district.

Question. Does the Macon office do business through your office, or direct with the home office?

Answer. It does business with our office.

Question. So that any papers sent to the company would be transmitted first to you, and then by you to the home office?

Answer. Yes, sir.

Question. And the home office in turn would transmit papers to you, and you would deliver them at Macon?

Answer. That is the method.

The Court: Practically the same as Mr. Lee testified to, isn't it?

Mr. O'Donohoe: What is it, your Honor?

The Court: Practically the same as Mr. Lee testified to, isn't it?

Mr. O'Donohoe: As Mr. Lee testified to.

Mr. Holliday: Mr. O'Donohoe kindly consented Mr. Cheney could go out of town, he having a pressing engagement elsewhere, and I agreed it could be stated Mr. Cheney would testify as Mr. O'Donohoe stated; but, of course, reserving the objection I made throughout to all testimony of this character as incompetent and irrelevant in this case.

HENRY G. SELLMAN, recalled to the witness chair, testified on behalf of the plaintiff, as follows:

Direct examination.

By Mr. O'Donohoe:

Q. There is one question, your Honor, I forgot asking this witness, I would like to ask him now.

268 Q. What do you mean, Mr. Sellman, by mortality table?

A. I can probably best explain by first reading a definition of mortality table given in Principles and Practice of Life Insurance, 8th Edition, which is a standard life insurance work, and from which the calculations have been made. Reading from pages 21 and 22—mortality table; the instrument by means of which are measured the probabilities of living and dying; a mortality table generally records the number of persons remaining alive at each age out of a fixed number born, such as 10,000, or 100,000, called the radix of the table; also the number dying between the respective ages; the radix may, however, commence at any even age, and in life insurance tables generally commences at age 10; the table terminates about age 100. To explain it in my own words, assuming a group of one hundred thousand lives, starting at age 10; we know that a certain number die during the ensuing year; that would leave the balance still living at age 11; out of that balance a certain number die during the year, and those remaining are still alive; so the table goes on down, the group decreasing year by year by the number who die during the year, until the table is entirely exhausted. Upon a table of this character, the calculations arising from a mortality table are based. The two tables used in this case have been the American experience table, and the actuaries' or combined experience table.

The Court:

Q. Expectancy of life?
A. Yes, sir.

Mr. O'Donohoe: That's all.
Mr. Holliday: That's all, Mr. Sellman.

Mr. O'Donohoe: It is admitted that the bill of exceptions

269 on the first appeal consists of fifty-eight pages, and on the second appeal it consists of 102 pages: that the depositions taken on the part of defendant in New York City, the first set consists of twenty-four pages, and the second consists of thirty-two pages; that the stipulation offered in evidence by plaintiff, being

Form No. 113A.
10000-8-1904
*

"DEFENDANT'S EXHIBIT B."

This Agreement

made this 12 day of Oct 190 4

between THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, party of the first part, hereinafter called the Company, and

Frederick W. V. and Mary S. Bleeb

parties of the second part, WITNESSETH:

The Company agrees to loan to the parties of the second part the sum of Ninety five hundred and fifty ——— dollars, apportioned as follows:

To pay premiums on Policy No. 1207072 to 1st day of Sept 1905	$	4291.50
Interest at 5% (adjusted also for interest on premiums)	$	468.00
Balance by Company's check,	$	4790.50
	$	9550

The receipt of the foregoing amount as a loan is hereby acknowledged upon the pledge as hereinafter set forth of Policy No. 1207072 in said Company. And the said parties of the second part agree to repay the

Frederick W. V. and Mary S. Blees

parties of the second part, WITNESSETH:

The Company agrees to loan to the parties of the second part the sum of Ninety five hundred and fifty ——— dollars, apportioned as follows:

To pay premiums on Policy No. 1207072 to 19 day of Sept 1905	$	4291.50
Interest at 5% (adjusted also for interest on premiums), - - - -	$	468.00
Balance by Company's check, - - - - - - - -	$	4790.50
	$	9550

The receipt of the foregoing amount as a loan is hereby acknowledged upon the pledge as hereinafter set forth of Policy No. 1207072 in said Company. And the said parties of the second part agree to repay the said sum of $9550. to the Company at its Head Office, Nassau, Cedar and Liberty Streets, in the City of New York, on the 19 day of Sept 1905

In Consideration of the amount of said loan the parties of the second part hereby assign, transfer and set over all of their right, title and interest in and to said Policy No. 1207072 issued by said Company on the life of Frederick W. V. Blees together with any and all moneys which may be or become payable under the same, to the Company as collateral security for the payment of said loan with interest, the said parties of the second part will forever warrant and defend the title of the said Company to the said Policy.

In the event of default in the payment of said loan on the date herein above mentioned, the Company is hereby authorized at its option, without notice and without demand for payment, to cancel said policy, and apply the customary cash surrender consideration then allowed by the Company for the surrender for cancellation of similar policies, namely, $ 9550 to the payment of said loan with interest, the balance, if any, to be payable to the parties entitled thereto on demand, or the Company may at its own option renew the said loan for one year or less period on the written request of any one of the parties of the second part hereto, and without further notice to any one of the parties of the second part.

In Witness Whereof, the said parties have executed these presents the day and year first above written.

Witness [signature] 3-10-05

Witness [signature] 9-23-05

Witness G Eugene Lains

Witness

Witness Pelton, G. B. F. Wolf 4/30/17

Witness

Frederick W. V. Blees
Insured.

Macon Mo.
Address.

Mary S. Blees

Macon Mo.

Plaintiff's Exhibit No. 6, consists of a little over five pages; that the motion to advance in the Supreme Court consists of five pages; and the reply of the defendant thereto, nearly two pages; that these motions, together with the abstracts of the record, briefs, the reply briefs and motions for rehearing on both appeals, consists in the total of 332 pages.

Mr. O'Donohoe: That's the plaintiff's case, your Honor.

Demurrer to Plaintiff's Evidence.

Thereupon, defendant, by its counsel, presented to the Court, in writing, and requested the Court to give and read to the jury the following instruction, in the nature of a demurrer to the evidence:

"The Court instructs the jury that, under the pleadings and the evidence offered for the plaintiff in this case, their verdict must be in favor of defendant."

Which instruction the Court refused to give and read to the jury; to which action and ruling of the Court in refusing to give said instruction, defendant, by its counsel, then and there duly excepted and still excepts.

Thereupon the defendant, to support the issues in its behalf, offered and introduced the following evidence:

270 *Defendant's Evidence.*

Mr. Holliday: I will offer in evidence the loan agreement, previously identified, the signatures to which have previously been identified by Mrs. Blees, which was marked by the st-nographer "Defendant's Exhibit B."

Mr. O'Donohoe: Now, if the Court please, we object to Defendant's Exhibit B, for the reason that the promise the defendant made concerning loans was to make them in conformity with its rules as then in force; and Defendant's Exhibit B is not attached to the policy set forth therein or endorsed thereon, and forms no part of the contract concerning loans, or any other feature of the policy.

Which objection was by the Court overruled; to which action and ruling of the Court plaintiff, by her counsel, then and there duly objected and excepted and still objects and excepts.

Said Defendant's Exhibit B is, in words and figures, as follows:

(Here follows agreement, "Defendant's Exhibit B," marked page 270a.)

Mr. Holliday: May it please the Court, and gentlemen of the jury, I will read in evidence to you this loan agreement Mrs. Liebing, plaintiff in the case, identified as having been signed by her husband and herself, in Macon, Missouri: "This agreement made this 12th day of October, 1904, between the Mutual Life Insurance Company of New York, party of the first part, hereinafter called
271 the company, and Fredrick W. V. and Mary S. Blees, parties of the second part, witnesseth: The company agrees to loan to the parties of the second part the sum of ninety-five hundred and fifty dollars, apportioned as follows: To pay premiums on policy No. 1,207,072, to 29th day of September, 1905, $4,291.50; interest at 5 per cent, adjusted also for interest on premiums, $468.00; balance by company's check, $4,790.50; total, $9,550.00. The receipt of the foregoing amount as a loan is hereby acknowledged upon the pledge as hereinafter set forth of policy No. 1,207,072 in said company. And the said parties of the second part agree to repay the said sum of $9,550 to the company at its head office, Nassau, Cedar and Liberty streets, in the City of New York, on the 29th day of September, 1905. In consideration of the amount of said loan the parties of the second part hereby assign, transfer and set over all of their right, title and interest in and to said policy No. 1,207,072, issued by said company on the life of Frederick W. V. Blees, together with any and all moneys which may be or become payable under the same, to the company as collateral security for the payment of said loan with interest, the said parties of the second part will forever warrant and defend the title of the said company to the said policy. In the event of default in the payment of said loan on the date herein above mentioned, the company is hereby authorized at its option, without notice and without demand for payment, to cancel said policy, and apply the customary cash surrender consideration then allowed by the company for the surrender for cancellation of similar policies, namely, $9,550, to the payment of said loan with interest, the balance,
272 if any, to be payable to the parties entitled thereto on demand, or the company may, at its own option, renew the said loan for one year or less period on the written request of any one of the parties of the second part hereto, and without further notice to any one of the parties of the second part. In witness whereof, the said parties have executed these presents the day and year first above written." Then follow the signatures which were identified by Mrs. Blees. I will pass this loan agreement among you so you gentlemen can look it over.

Mr. O'Donohoe: Now, if your Honor please, I move that this exhibit, Defendant's Exhibit B, be stricken out. In Miller against Insurance Company, a similar situation arose, where a stipulation——

The Court: Is that upon the theory that that is in contradiction of the laws of the State of Missouri?

Mr. O'Donohoe: And in addition to that, your Honor, even if in harmony with the laws of the State of Missouri, it is not a part of the contract of insurance; to make it a part, it would have to be attached to it, endorsed on it, or set forth in it. What this loan was to be made on was not the loan agreement, but upon the rule

of the company then in force; those rules are not set forth in the policy; they are not pleaded, but they bring forward a loan agreement, which, if it is to be given the effect of working a forfeiture, it should be as the Court says in this case concerning a manual, which was offered in evidence: "The manual giving these definitions was not a part of the policy, nor was it mentioned or referred to therein, yet if its provisions were to have the effect desired by defendant, they would have to become one of the principal parts of the contract. To have had this effect they should have been
273 embodied in the face of the contract, or referred to therein, and made a part thereof in plain, unmistakable terms.

Now, if this policy is to be forfeited upon the terms of Exhibit B, it would have to be set forth in the policy in plain and unmistakable terms; instead of that, it is not referred to at all; Blees did not agree that it should be made pursuant to this loan agreement, but agreed that it should be made pursuant to the rules of the company in force at the time of the loan. These are not pleaded, nor are they set forth in the policy, and they are not set forth in the pleadings. Now, to allow a loan to be made without any consideration for it, which operates as a forfeiture of the insurance upon terms which are drastic, it seems to me the forfeiting instrument would have to be set forth in the policy or attached to it.

The Court: I think the rule has been that it is a separate transaction from the issuance of the policy.

Mr. O'Donohoe: Yes, but the Missouri Courts hold it is subsidiary; so do the New York Courts; but assuming that it is a contract independent of the policy, the new contract can't enlarge on the policy unless the policy itself contains those drastic forfeiture stipulations. Here the loan agreement can't improve on it because there would be no consideration for it. That is the position we take, your Honor.

The Court: Didn't they, in this Dodge case, touch upon that point?

Mr. O'Donohoe: The Dodge case, your Honor, went off on the proposition that the New York laws permitted of those sort of
274 forfeitures, and that those contracts were not subsidiary, but they were independent contracts—contracts independent of the policy; that is not the law of Missouri, and it is not the law of New York. But in that case the policy stipulated for the making of that loan pursuant to the company's loan agreement. If your Honor will read the policy in this case, it says that the loan shall be made in conformity with the rules of the company then in force; the stipulations are quite different. In other words, the plaintiff and insured were entitled to a loan on the terms of the policy; to make more drastic stipulations it would be necessary to support them with some consideration.

The Court: Isn't this the meat of the whole thing, this question upon whether—the very foundation upon which the question of which law is applicable is based?

Mr. O'Donohoe: No matter what law is applicable, your Honor, the position we take is that this loan agreement enlarges upon the policy, and is void. If they wanted to seek a forfeiture it would be

necessary for them to plead that the loan was made pursuant to the rules, and set forth the rules; first of all, they would have to set them forth in the policy and, not having set them forth in the policy, they should not be allowed to set them forth in the pleadings; but, at any rate, if relied on, they have to set them forth in the pleadings. If otherwise allowable, the grounds of forfeiture of this insurance would have to be pleaded, and they can't have a policy that says one thing and a pleading that says something else, nor evidence supporting a pleading which says something different to the policy.

The Court: I will overrule the motion at this time.

275 To which action and ruling of the Court plaintiff, by her counsel, then and there duly objected and excepted, and still objects and excepts.

Mr. Holliday: Your Honor, and gentlemen of the jury, I wish to offer in evidence the check, the signatures on the back of which were identified by Mrs. Blees, being Defendant's Exhibit "C".

DEFENDANT'S EXHIBIT "C."

Said Defendant's Exhibit C is in words and figures as follows:

The Mutual Life Insurance Company of New York.

No. 11931.

New York, Oct. 12, 1904.

American Exchange National Bank.

Pay to the Order of Frederick W. V. Blees and Mary S. Blees $4,790.50, Forty seven hundred & ninety 50/100 Dollars.
Not over five thousand dollars, 5000.

ISAAC F. LLOYD,
2 Vice-President.

ALBERT CLAMROTH,
Asst. Secretary.

Endorsed on back as follows:

Pay to the order of National Bank of Commerce, St. Louis, Mo.
FREDERICK W. V. BLEES.
MARY S. BLEES.

276 Merchants Ex. Nat. Bank, New York City:

Pay —— —— or Order.
Oct 18 1904

THE NATL. BANK OF COMMERCE
IN ST. LOUIS.
J. A. LEWIS,
Cashier.

Received payment through New York Clearing House Oct. 19 1904.
MERCHANTS EXCH. NAT. BANK OF THE
CITY OF NEW YORK.
NOTE TELLER.

Mr. Holliday (reading): The Mutual Life Insurance Company f New York. New York, October 12, 1904. No. 11,931. American xchange National Bank, pay to the order of Frederick W. V. Blees nd Mary S. Blees, $4,790.50, forty-seven hundred and ninety and fty one-hundredths dollars. Albert Clamroth, Assistant Secretary. saac F. Lloyd, Second Vice-President. On the back: Pay to the order f National Bank of Commerce, St. Louis, Missouri. Frederick W. V. Blees, Mary S. Blees; and stamp referred to in evidence showing the anks through which the check passed.

Mr. Holliday: I next wish to offer in evidence part of the applica- ion heretofore identified as Defendant's Exhibit "A", that is, of ourse, unless Mr. O'Donohoe desires me to read the entire applica- tion.

Mr. O'Donohoe: We object to any part of the application, because it is no part of the policy, not set forth in it, attached to it, or en- dorsed on it, and by express statute of this state is not competent in evi- dence.

Mr. Holliday: The statute of the State which Mr. O'Donohoe re- fers, your Honor, has reference to policies issued in Missouri by Mis- souri companies.

277 Mr. O'Donohoe: And to companies that come into the State as the Mutual Life.

Mr. Holliday: Which decisions say that?

Mr. O'Donohoe: (Schuler against Metropolitan Life, 191 Appeals.)

The Court: What is that, application for the loan?

Mr. Holliday: No, that is the application for the policy, your Honor.

The Court: Is that endorsed on or made a part of the policy?

Mr. Holliday: It is made a part of the policy of insurance by a reference in the policy itself.

The Court: Is it attached to it? A great many of the policies now have a copy of the application attached to the policy.

Mr. Holliday: The person subscribing to the proposal of this con- tract—that is the way it is referred to here, and the application re- cites that it is the basis of the policy.

Mr. O'Donohoe: The statute says it must be set forth or endorsed on the policy.

The Court: Now, was that law in effect at the time this application was taken out?

Mr. Holliday: No, your Honor, the law in New York was not passed——

The Court: I have reference to the law in Missouri.

Mr. O'Donohoe: Yes, your Honor, long before that policy was is- sued.

The Court: What is the purpose of this; does this change the con- ditions of the policy?

Mr. Holliday: Oh, no; it couldn't change the conditions of th
policy, your Honor; I simply wanted to read in evidence tha
278 part of the application, the part of the application where Mr
Blees applied for this policy, beginning up here and giving th
answer which he gave to the questions and the agreements he entere
into at the time this policy was taken and he made the application fo
the policy. Of course, I admit that nothing in the application coul
change the terms of the policy.

Mr. O'Donohoe: It is not competent at all, your Honor, under th
express statute, as construed by the courts of this State.

The Court: According to this decision, it is incompetent.

Mr. Holliday: Well, I would like to make my offer of it, you
Honor.

The Court: Yes.

Mr. Holliday: And to make this statement, that if your Honor i
to exclude from evidence the application in this case because th
provisions of Section 6978 of the Revised Statutes of Missouri, 1909
then——

The Court: No, I am making it, as I understand this was in effect
this same statute went in effect in 1899, prior to the issuance of thi
policy.

Mr. Holliday: I simply referred—I had that here, because th
provisions then of Section 7929 of the Revised Statutes of 1899, ar
now Section 6978 of the Revised Statutes——

Mr. O'Donohoe: I don't think the gentleman should get the Cour
to pledge itself upon what theory it is rejecting the exhibit; I think
it is enough if the Court excludes it.

Mr. Holliday: I think defendant is entitled—you have
279 based you- objections on the ground of the statute, and his
Honor stated he considered it incompetent because of the
statute, and I am now——

The Court: In view of the fact that the statute has not been com-
plied with, in that the copy of the application was not fixed and made
a part of the policy, other than by reference to the front page of the
policy, without anything further being shown.

Mr. Holliday: Now, therefore, I would like, if I may continue my
statement for the record of your Honor's ruling, I wish to make this
statement, that so to construe this Section 7929 of the Revised Stat-
utes of 1899, now Section 6978 of the Revised Statutes of 1909, as to
exclude the application, or any part thereof from evidence in this
case, is to deny us equal protection of the laws, to deprive us of our
property without due process of law, and to deprive us of our liberty
of contract, for the following reasons, among others, that the section
in question of the statute reads as follows: "Every corporation, com-
pany or association transacting business under the provisions of this
article shall, upon the issuance of every policy, attach to such policy
or indorse thereon, the substance of the application upon which such
policy was issued, and which is made a part of the contract of insur-
ance, or referred to therein, or which may in any manner affect the
validity of such policy." That this section appears as part of Article
IV, of Chapter 61, of the Revised Statutes of Missouri, 1909, and ap

peared as part of a similar article of appropriate chapter in 1899; that the heading of said article is, "Insurance on the Stipulated Premium Plan"; that the definition of what constitutes insurance on the stipulated premium plan does not apply to the Mutual
280 Life Insurance Company, the defendant in this case, which is not doing business on the stipulated premium plan, but which is shown by the pleadings and the admissions of the plaintiff herself in this case to be a mutual life insurance company.

The Court: This decision does not so interpret the law; furthermore, the understanding is that the policy is a contract between the parties; now, you wouldn't say that the memoranda they had, going to make up a contract would be competent evidence where the contract is offered, would you?

Mr. Holliday: No, I wouldn't say that, your Honor, for a minute; but here is a written application a simple proposal.

The Court: What is the purpose of the application—what is the purpose of introduction of the application?

Mr. Holliday: The introduction of the application is to show the answers made by Mr. Blees, the insured, under this policy when he applied for it, and which he agreed should be and become a part of the agreements, of the policy itself.

The Court: I can't see that any portion you have shown me there had any applicability to the policy as to the case in question; that is, mere questions and answers there, unless it is—I can possibly understand the purpose of it, but I can't see the relevancy or competency of it.

Mr. Holliday: Mr. O'Donohoe has attacked, not only in his petition but in his reply, many of our averments concerning this policy, the terms of it, and this loan agreement; one of our purposes in offering this portion of the application is to show that at the very
281 outset of the contract, here on page 2, which was signed by Mr. Blees, he states, this application made to the Mutual Life Insurance Company of New York is the basis, and part of the proposed contract for insurance, subject to the charter of the company and the laws of the State of New York.

The Court: Yes, and if that had been attached to the policy and made a part of the policy, and he had a copy of it, I would say that that would be all right. In view of the fact, as I stated before, that photographic copy, was not attached, or an exact copy of that was not attached to the policy and made a part thereof, or a showing made that the copy had been turned over to the insured with the policy, to become a part, I will exclude it.

Mr. Holliday: I wish then to make a further statement, your Honor, that we maintain that your Honor's ruling deprives us of our property without due process of law, and in violation of both the Constitution of Missouri and the Constitution of the United States, not only for the reasons already given as to pleading this section of the statute, but for the further reason that even were this section of the Missouri statute applicable here, to this company and to this policy, that the section of the statute provides no penalty for the failure to attach the application, nor is there any penalty found in

any other act or statute in the State of Missouri, and that, therefore, to enforce such a penalty as that is to read into the statute something which is not there.

The Court: Proceed; I have ruled on it.

Which objection was by the Court sustained, to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted, and still objects and excepts.

282 Mr. Holliday: May it please the Court, and gentlemen of the jury, referring to the policy in suit, which has already been offered in evidence, I wish to call your attention to certain portions of this policy. Mr. O'Donohoe has already read you parts of it, and I want to call your attention to these other parts. It is not necessary to read it all, because it contains a good deal which is of no interest in this controversy. On page 2, under the heading Loans, is the wording: After this contract shall have been in force three full years, within sixty days after written application and upon the assignment of this contract as security, the company will, in conformity with its rules as then in force, loan amounts within the limits of the cash surrender value, with interest in advance, at the rate of 5 per cent per annum, provided: (1) that the deposits be fully made to the end of the contract year in which the loan falls due; (2) that in any settlement of this contract all outstanding indebtedness hereon to the company must be paid. All payments hereon of loans and interest shall be made in gold coin.

Mr. Holliday: Now, attached to this policy was the table of guarantees that are referred to here in the different options that are mentioned, showing you values under this policy; it is on a separate piece of paper, attached to the policy; it is headed, Mutual Life Insurance Company of New York, Richard A. McCurdy, President; age of insured, 41; then right across the top of one of these tables, the words, Guarantees Corresponding to Each Bond of $1,000, and In Lieu Thereof; and over on the right is 5 per cent 20-year Gold Bond Life, 10 Payments, 20-year D. P., 20 D. P. meaning distribution period. Down here are given the ends of the years for

283 which the policy has been in force. For the end of the third year you will note that the cash surrender value was $124 for each $1,000 bond; at the end of the fourth year the cash surrender value stated there was $191 for each $1,000 bond. Multiplying that figure, 191 by 50, which was the number of bonds that this policy agreed to deliver, gives the sum of $9,550, which was stated to be the surrender value of this policy, cash surrender value at the end of the fourth year; that is, September, 29th, 1905, when this loan matured.

Mr. Holliday: I also will pass this policy because on the back of it you will find certain other marks, which are referred to in the deposition which I am about to read. You can examine the policy at your leisure.

Mr. Holliday: I will offer in evidence, your Honor, the deposition of Frederick W. Mercer.

Mr. O'Donohoe: If the Court please, we object to the offer of that deposition, and we also object to the introduction of any laws of the State of New York, or any evidence tending to show what the laws of the State of New York are applicable for the following reasons: First, because the defendant waived the right to invoke the New York statutes, or laws, as a defense herein, even if applicable, which plaintiff denies, because it failed to lodge said New York statutes or laws as a defense herein, either in its first answer, or in its amended answer, being the amended answer upon which this case was tried in the Circuit Court and Supreme Court the first time; and, having failed to timely invoke the New York statutes or laws it thereby waived the right to set them up as a defense herein; second, because when it filed its first answer and amended answer
284 herein, the New York statutes and laws were known to the defendant and open to it as a defense herein, and were within the legitimate scope of the pleadings at that time, and, having failed to lodge the New York statutes or laws as a defense herein until after the case came down from the Supreme Court for retrial, defendant became and it is now estopped from setting up said New York statutes or laws as a defense in this case, even if they were applicable, which plaintiff denies; third, because the defendant is estopped from setting up said New York statutes or laws as a defense herein, for the further reason that this case was litigated upon the proper theory that the Missouri laws were controlling, and the issues were tried out under said Missouri laws; fourth, because when the plaintiff made demand of defendant for the payment of the policy in suit, less the outstanding loans and interest thereon, the defendant denied liability on the ground that there was no decision of the Supreme Court of Missouri conclusively deciding the points arising in this case, and upon these grounds alone; that the plaintiff was led into the belief by the attitude thus assumed by the defendant that its only defense was that there was no decision of the Supreme Court of Missouri conclusively deciding the points involved in this case, and plaintiff was thus put to great trouble and expense in establishing that under the Missouri laws plaintiff was entitled to recover, and was put to much trouble and expense in litigating the issues so as to obtain the opinion of the Supreme Court thereon. In the decision of the Supreme Court, it was correctly held that the non-forfeiture statutes of the state of Missouri were applicable, and disposed of the whole matter; that the defendant now invokes
285 the statutes and laws of the state of New York for the purpose of introducing a new defense to evade the force and effect of the decision and mandate of the Supreme Court of Missouri on the first appeal, and for that purpose alone; fifth, because it is the established rule of decision in the State of Missouri and elsewhere, that no new isues can be made nor no new defense asserted after the case comes down from the Supreme Court for retrial, this on the theories, among others, that if a case is to be tried by piecemeal the end of a lawsuit would never be reached, and at the trial of a case all issues and defenses should be brought forward at the

beginning; sixth, because the defendant invokes in its present answer the laws of the State of Missouri, and thus waives the laws of the State of New York; seventh, because proof required to establish the New York laws is essentially different from the proof applicable and necessary to the original pleadings; eighth, because on the first trial in the Circuit Court the plaintiff was non-suited, and her petition dismissed, and all matters involved in this case became res adjudicata under the first decision of the Supreme Court in this case; ninth, because the Supreme Court on the first appeal held that the evidence was sufficient to take the case to the jury on all the issues raised, and the same became the law of this case; tenth, because it is a settled rule of decision that, "He who did not speak when he should have spoken, shall not be heard now that he should be silent"; eleventh, because neither the application for the policy nor the loan agreement are available to form a defense herein, since neither is attached to, endorsed on, nor set forth in the contract of insurance; twelfth, because with respect to loans, the agree-
286 ment was that they should be made in conformity with the defendant's rules in force when the policy was issued; further, it was upon these rules, and upon these rules alone, that the right of forfeiture for non-payment of a loan can be predicated, and since the defendant failed to plead said rules the New York laws can have no place in this case; thirteenth, because the incontestability stipulation in said policy shuts off all defenses, including those founded upon the New York statutes and laws; fourteenth, because neither the policy nor the policy loan agreement in this case is a contract of the State of New York, and that the statutes and laws of the State of New York referred to in the defendant's last answer, and also now offered in evidence, to be read in evidence, are unconstitutional and void, and especially if given extra-territorial effect to control the policy, or the policy loan agreement herein, both of which are contracts of the State of Missouri, and to receive said statutes or laws of the State of New York, or any evidence concerning the same as a defense herein, or to apply said New York statutes or laws in this case, would fail to give full faith and credit to the acts and transactions lawfully done in the State of Missouri, and would therefore be contrary to and in violation of Section 1 of Article IV of the Constitution of the United States, and would abridge the privileges and immunities of this plaintiff as a citizen of the United States and State of Missouri, contrary to and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and Section 2 of Article IV of the Constitution of the United States, and of Section 4 of Article II of the Constitution of the *the* State of Missouri, and would deprive the par-
287 ties to said contracts of their liberty of contract in the State of Missouri, and would deprive plaintiff of her property without due process of law, contrary to and in violation of Article V and of Section 1 of Article XIV of the Amendments to the Constitution of the United States, and contrary to and in violation of Section 30 of Article II of the Constitution of the State of Missouri,

and would impair the obligations of said contracts of insurance and policy loan agreement duly made between said parties in the State of Missouri by change of decision and would therefore be contrary to and in violation of Section 10 of Article I of the Constitution of the United States, and would be contrary to and in violation of Sections 4 and 15 of Article II of the Constitution of the State of Missouri, and would deprive the plaintiff of the equal protections of the laws of the State of Missouri, contrary to and in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States, and Section 10 of Article I of the Constitution of the United States, and would fail to give full faith and credit to the statutes and decisions of the State of Missouri, contrary to and in violation of Section 1 of Article IV of the Constitution of the United States, and Section 10 of Article II of the Constitution of the State of Missouri; fifteenth, because the policy and policy loan agreement in this case are Missouri contracts, and being such, Section 7897, Revised Statutes of the State of Missouri, 1899, which in part provides, "that in the event of non-payment of premium after the payment of three annual premiums the net value of the policy when the premium becomes due and is not paid shall be computed
288 upon the Actuaries' or Combined Experience Table of Mortality with 4 per cent interest per annum and after deducting from three-fourths of said net value any notes or other evidence of indebtedness to the company given on account of past premium payments on said policies issued to the insured, which indebtedness shall be then canceled, the balance shall be taken as a net single premium for temporary insurance for the full amount written in the policy", together with the cases of Cravens against New York Life, 148 Missouri 583, affirmed 178 U. S. 389; Horton against New York Life, 151 Missouri 604, and Smith against Mutual Benefit Life, 173 Missouri 329, and all identical and analogous Missouri decisions construing said section, entered into and became constituent elements of the policy and loan contracts between the parties, constituting a part of the consideration for entering into said contracts and in contemplation of law it is the same as if the sections and decisions aforesaid had been written into the face of said policy, and loan contracts; that failing to hold the policy and policy loan agreement Missouri contracts, or failing to apply said section or decisions above referred to in this case, or failing to give the benefit of the same to plaintiff in this case, would fail to give full faith and credit to the acts and transactions lawfully done in the State of Missouri, and would therefore be contrary to and in violation of Section 1 of Article IV of the Constitution of the United States, and would abridge the privileges and immunities of this plaintiff as a citizen of the United States and State of Missouri, contrary to and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and of Section 2 of Article IV of the
289 Constitution of the United States, and of Section 4 of Article II of the Constitution of the State of Missouri, and would deprive the parties to said contracts of their liberty of contract in the

State of Missouri, and would deprive plaintiff of her property without due process of law, contrary to and in violation of Article V, and of Section 1 of Article XIV of the Amendments to the Constitution of the United States, and contrary to and in violation of Section 30 of Article II of the Constitution of the State of Missouri, and would impair the obligations of said contract of insurance and policy loan agreement duly made between said parties of Missouri by change of decision, and would therefore be contrary to and in violation of Section 10 of Article I of the Constitution of the United States, and would be contrary to and in violation of Sections 4 and 15 of Article II of the Constitution of the State of Missouri, and would deprive the plaintiff of the equal protection of the laws of the State of Missouri, contrary to and in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States, and Section 10 of Article I of the Constitution of the United States, and would fail to give full faith and credit to the statutes and decisions of the State of Missouri, contrary to and in violation of Section 1 of Article IV of the Constitution of the United States, and Section 10 of Article II of the Constitution of the State of Missouri.

Thereupon the Court took a recess until 3:50 o'clock p. m. of the same day, May 13th, 1919; at which day and hour court was
290 duly reconvened, and the jury being present as before, the following proceedings were had, to-wit:

The Court: The objection, I think, is made a little in advance of the offer of evidence; I don't know what the testimony is going to show, what the purpose of it is. When you make that objection again, you can just consider the objection as dictated in there as the objection which you wish to make. I say that the objection at the present time is premature because I don't know what Mr. Mercer is going to testify to, or what the purpose of his testimony is.

Which objection was by the Court overruled; to which action and ruling of the Court plaintiff, by her counsel, then and there duly objected and excepted and still objects and excepts.

Mr. Holliday: Gentlemen of the jury, I will read you the deposition of Frederick W. Mercer, a witness produced on the part of the defendant, of lawful age, sworn and examined, deposeth and saith:

FREDERICK W. MERCER.

Direct examination.

By Mr. Holliday:

Q. What is your name?
A. Frederick W. Mercer.
Q. Where do you reside?
A. Eighty-seven Woodland avenue, Summit, New Jersey.
Q. By whom are you employed?

A. By the Mutual Life Insurance Company of New York.
Q. In what capacity?
A. As superintendent of policy loans.
Q. Where you employed by the Mutual Life Insurance
91 Company of New York in October, 1904?
A. Yes, sir; I was.
Q. In what capacity?
A. As insurance loan clerk.
Q. How long have you been employed by the defendant company.
A. Thirty-one years.
Q. When did you first become insurance loan clerk?
A. About December 1st, 1898, and I was in charge of domestic loans up to May 14th, 1906, and from that date on I have been in charge of both domestic and foreign loans. By foreign loans I mean loans made upon policies to policyholders outside the territorial limits of the United States of America and Canada, and by domestic loans I mean loans made on policies to policyholders within the territorial limits of the United States and Canada.
Q. Since December 1st, 1898, where have you performed your duties as an employe of the Mutual Life Insurance Company of New York?
A. At the company's home office, 32 and 34 Nassau street, Borough of Manhattan, City of New York and State of New York.
Q. I show you a document marked in red ink "Defendant's Exhibit B", purporting to be a loan agreement between the Mutual Life Insurance Company of New York and Frederick W. V. Blees and Mary S. Blees, and ask you whether this document came into your charge and possession (handing witness paper)?
A. (Examining paper.) This document was received by the company and came into my charge and possession.
Q. Where did the company receive this document?
A. At its head office, 34 Nassau street, Borough of Manhattan, New York City.
Q. Do you remember the date when the document was
292 received by the company?
A. October 10th, 1904.
Q. I show you a policy of insurance of the Mutual Life Insurance Company of New York, No. 1,207,072, marked in red ink, "Defendant's Exhibit A", and ask you whether or not that policy came into your charge and possession at the same time that the loan agreement, Defendant's Exhibit "B", came to you (handing witness paper)?
A. (Examining paper.) Yes, this policy was received by me at the home office at the same time and together with the loan agreement, "Defendant's Exhibit B".
Q. What did you do when you first received these documents?
A. The first step was to prepare a card showing the loan value of the policy. The signatures on the loan agreement were then compared with the names appearing on the face of the policy to ascertain whether or not the loan agreement was correctly signed. The

loan agreement was found to be signed in accordance with the name on the policies, and the signature upon the agreement were then approved.

Q. Was the amount of the loan within the limits of the cash surrender value of the policy?

A. The amount of the loan was the same as the cash surrender value of the policy at the maturity date of the loan—that is, at the end of the fourth year of the policy.

Q. Was there any difference between the customary cash surrender consideration then allowed by the company and the cash surrender value of the policy?

A. No. The policy fixed the cash surrender value at the end of the fourth year, provided all premiums are paid, at $9,550,
293 and the customary cash surrender consideration for this kind of policy at the end of the fourth year, namely, September 29th, 1905, was the sum of $9,550, and that is the amount fixed in the loan agreement. The words "customary cash surrender consideration" used in the loan agreement are used interchangeably and convey the same meaning and are used the same as the phrase "cash surrender value" as it appears in the policy.

Q. What did you find upon examining the loan agreement or the said policy?

A. I found that the loan agreement was signed by Frederick W. V. Blees and Mary S. Blees, whose names appear on the face of the policy, as insured, and beneficiary, respectively.

Q. What did you do next?

A. I accepted the loan agreement, together with the pledge of the policy on behalf of the Mutual Life Insurance Company of New York and approved the making of the loan to Frederick W. V. Blees and Mary S. Blees, and directed the cashier of the Mutual Life Insurance Company of New York to deduct the premium due by the terms of the policy on September 29th, 1904, amounting to $4,291.50, the interest in advance amounting to $468, and prepare check for the balance of the proceeds of the loan of $4,790.50, and sent the same, together with the premium receipt for the premium due September 29th, 1904, to Frederick W. V. Blees and Mary S. Blees.

Mr. O'Donohoe: If the Court please, I ask that that be stricken out; it is in conflict with our stipulation—forwarded to Frederick W. V. Blees and Mary S. Blees. They have stipulated it was forwarded to the St. Louis office, and by the St. Louis office for-
294 warded to the Macon office, and by the Macon office delivered to Blees.

Mr. Holliday: I have only this to say in connection with Mr. Mercer's testimony, your Honor; that he does not purport to say in here whether or not it was sent direct to Macon; his language is that they prepared a check, he instructed them to prepare a check for the balance of the proceeds of the loan of $4,790.50, and send the same, together with the premium receipt for the premium due September 29th, 1904, to Frederick W. V. Blees and Mary S. Blees.

The Court: No question *about* what it was sent through St. Louis to Macon?

Mr. Holliday: No question about it; and Mr. Mercer did not have that point in his mind when he testified; it came through St. Louis and from there was sent to Macon.

Mr. Holliday (reading deposition):

Q. I now show you a check of the Mutual Life Insurance Company of New York, dated October 12th, 1904, No. 11931, which I will ask the notary to mark for identification "Defendant's Exhibit C", and ask you whether you are familiar with the signatures on that check (handing witness paper)?

A. (Examining paper.) Yes, sir; I am familiar with the signatures on that check.

At this point the notary was handed a check dated October 12th, 1904, and referred to in the examination of the witness as Defendant's Exhibit "C", and marked upon the face thereof as follows: "Defendant's Exhibit 'C', April 12, 1917, F. S. Castyglone, Notary Public."

Mr. Holliday (to the jury): That is the same check which is in evidence here as Defendant's Exhibit "C" here, I think; also, there is the mark which was put upon it by the notary in New York, "Defendant's Exhibit 'C', April 12th, 1918, F. W. C., Notary Public."

Mr. Holliday (reading deposition):

Q. Whose signatures are they?

A. Albert Klamroght, assistant cashier, and Isaac F. Lloyd, the second vice-president.

Q. Were they officers of the Mutual Life Insurance Company of New York on the 12th day of October, 1904?

A. Yes, sir; they were officers on October 12th, 1904.

Q. I will ask you whether from an examinaton of Defendant's Exhibit "C", you can state if that is the check which was sent in payment of the cash balance under the loan agreement, Defendant's Exhibit "D"?

A. Examining this check, I can state that this is the check that was sent for the proceeds of the loan made under Defendant's Exhibit "B" after deducting from the loan the premium of $4,291.50, and advance interest of $468.00.

Q. Where was that check signed and issued?

A. This check was signed and issued at the company's home office, 34 Nassau street, New York City.

Q. Where is the American Exchange National Bank located?

A. At the corner of Broadway and Cedar street, New York City.

Q. Can you state from the examination of these documents, or from your own knowledge, on what date the loan was accepted by you for the Mutual Life Insurance Company of New York?

A. Yes, sir; this loan was accepted by me for the Mutual Life Insurance Company of New York on October 12th, 1904.

Q. At that time what officer or officers of the Mutual Life I surance Company had authority to approve and accept loans behalf of the company?

296 A. The policy loan business at that time was under t jurisdiction and control of William J. Easton, secretary, a I, as insurance loan clerk, was the head of the department havi charge of loans made by the company upon its policies, and I h direct and exclusive charge of that department.

Q. Did anyone in the State of Missouri in October, 1904, ha authority to approve or accept loans on behalf of the Mutual Li Insurance Company of New York?

Mr. O'Donohoe: Now, in addition to the objection we made at t outset, we object to that as calling for a conclusion of the witne the question is, did anyone——

The Court: Of course, the question is, what was done in this ca

Mr. O'Donohoe: The question is, did anyone in the State Missouri, in October, 1904, have authority to approve or accept loa in behalf of the Mutual Life Insurance Company of New Yor calls for a conclusion.

The Court: What is Mercer's position ?

Mr. Holliday: He was head of the Loan Department; he testifi at that time domestic loan department of that company at th time.

The Court: Domestic loan department?

Mr. Holliday: He identified that as meaning loans made policies within the United States.

The Court: Objection overruled.

Which objection was by the Court overruled; to which action a ruling of the Court plaintiff, by her counsel, then and there du objected and excepted, and still objects and excepts.

297 Mr. Holliday (reading deposition):

A. No, sir; they did not.

Q. What did you do with the policy and the loan agreement Defendant's Exhibits "A' 'and "B," respectively, after October 12th 1904?

A. After the loan was made on October 12th, 1904, the polic and the loan agreement were retained at the home office of th company, 34 Nassau Street, New York City, as collateral securit for the loan, and kept in our vaults.

Q. Were the steps taken by you in approving and accepting thi loan on behalf of the company in conformity with the rules of th company then in force?

Mr. O'Donohoe: Just a moment; we object to that as calling for conclusion, and we object to it, furthermore, because the rules of th company are not pleaded in this case.

Mr. Holliday: There is certainly no requirement to plead evidenc

Mr. O'Donohoe: Plead facts.

The Court: Have the rules of the company ever been offered?

Mr. O'Donohoe: No, your Honor, nor pleaded; the policy requires or agrees that this loan should be made in conformity with the rules of the defendant in force at the time the loan was made; those rules are not set forth in the policy, nor in the pleadings, and this is a mere conclusion of the witness without telling us what the rules contain, or without them being set forth in the policy of insurance.

The Court: Yes, that would appear as being a conclusion of the witness, unless we had the rules before us in order that we might determine whether he is right or wrong.

Mr. Holliday: Here, your Honor, *was* a witness who *is* at the head of this department at the time, who had, he says, direct and exclusive charge of that department—certainly he would be qualified.

The Court: How can you bind the other parties with his testimony with reference to rules unless there is something before them, or their attention is called, directed in some way—they should have the rules before them.

Mr. O'Donohoe: The rules are the best evidence, yes, sir.

The Court: The objection will be sustained to that.

Which objection was by the Court sustained; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted, and still objects and excepts.

Mr. Holliday (reading deposition):

Q. Was the loan agreement, Defendant's Exhibit "B," in the form required by the rules of the company then in force?

Mr. O'Donohoe: Same objection.

The Court: Same ruling:

Which objection was by the Court sustained; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted, and still objects and excepts.

Mr. Holliday (reading deposition):

Q. Was this loan of $9,550, or any part thereof, paid by Frederick W. V. Blees and Mary S. Blees, or either of them, or any person for them, on the 29th day of September, 1905?

A. No, sir, such loan was not paid.

Q. What did you do after September 29th, 1905, in regard to this loan of $9,550 on the policy, Defendant's Exhibit A?

A. The loan was not paid nor renewed, and I then directed that the policy be canceled for non-payment of the loan, as provided under the terms of the loan agreement, so that the customary cash surrender consideration allowed by the company on the policy, namely, the sum of $9,550, could be applied to the payment of the loan.

Mr. O'Donohoe: Now, your Honor, I move that that answer be stricken out. The witness undertook to cancel the policy according

to a certain loan agreement when the policy stipulates that the loa
should be made on the rules of the company.

The Court: I understand that is covered by statute, too; is it no
in the State of Missouri?

Mr. O'Donohoe: The application is, your Honor, but not the loa
agreement.

The Court: The question of cancellation of the policy.

Mr. O'Donohoe: Well, I don't know about that, but the cancella
tion of the policy—they undertook to cancel this policy by virtue o
a loan agreement.

The Court: He is telling what was done here.

Mr. O'Donohoe: He is telling what was done.

The Court: He merely instructed them—what was done; he may
answer.

Which objection was by the Court overruled; to which action and
ruling of the Court, plaintiff by her counsel then and there duly
objected and excepted and still objects and excepts.

Mr. Holliday (reading deposition):

Q. I show you a paper which I will ask the notary to mark for
identification "Defendant's Exhibit D," and ask you whether this
paper was prepared by you, or some one under your charge
300 and control (handing witness paper)?
A. (Examining paper.)

This paper was prepared by some person under my charge and
control, and at my direction.

At this point the notary was handed a paper dated November 15th,
1905, and referred to in the examination of the witness as Defend-
ant's Exhibit "D," and the same was marked for identification on
the face thereof as follows: "Defendant's Exhibit D, April 12th,
1917, F. S. Castyglone, Notary Public."

Mr. Holliday: I here hand the notary for identification as De-
fendant's Exhibit "D," the paper referred to in the deposition, bear-
ing the mark "Defendant's Exhibit D, April 12th, 1917, F. S.
Castyglone, Notary Public"; and offer the same in evidence.

Mr. Holliday: This is headed, Insurance Loan Department,
November 15, 1905. To the Actuary: Please prepare policy number
1,207,072, insuring Frederick W. V. Blees, for surrender. Policy
loan has not been paid. Amount of loan, $9,550, Interest on Loan
(blank). Loan due September 29th, 1905.

Mr. Holliday (reading deposition):

Q. What is the date on that paper?
A. November 15th, 1915.

Mr. Holliday: That is error; evidently should have been 1905.

Mr. Holliday (reading deposition):

Q. Was that after the expiration of the period of grace allowed for the payment of the premium due September 29th, 1905, on this policy?

A. Yes, sir, it was.

Q. I call your attention to the fact that on the back of said policy, Defendant's Exhibit "A," there is pasted a slip of paper bearing the form number "3-10-05," and ask you whether you are familiar with the initials "L. P. L." appearing in the lower left hand corner of that slip?

A. (Examining Defendant's Exhibit "A.") Yes, sir, I am familiar with these initials, which stand for the name of Louis P. Lord.

Q. Was he an employe of the Mutual Life Insurance Company of New York at that time?

A. Yes, sir, he was.

Q. What was the necessity or reason for this slip being prepared and pasted on this policy?

A. The reason for the preparation and pasting of this slip on the policy was to indicate that the loan thereon had not been paid nor renewed and that such policy was canceled by the application of its surrender consideration for the same amount as the loan.

Q. Was this slip prepared in accordance with the instructions contained in the paper heretofore identified by you as Defendant's Exhibit "D"?

A. Yes, sir; it was.

Q. I call your attention to the fact that across the face of the loan agreement, Defendant's Exhibit "B," is stamped the word "Canceled," and I ask you whether or not you know where that stamp was placed upon that agreement?

A. (Examining Defendant's Exhibit "B.") This stamp was placed upon the agreement in the policy loan department at the company's home office, 34 Nassau street, City of New York, when the policy was canceled.

Q. Were or were not the policy, Defendant's Exhibit "A," and the loan agreement, Defendant's Exhibit "B," continuously in your department, under your charge, in the City of New York and State of New York, from the time they were received there on October 10th, 1904, until after the policy had been canceled and the surrender value applied to the payment of the loan in November, 1905?

A. Yes, sir; such papers were.

(Signed) FREDERICK W. MERCER.

Subscribed and sworn to before me, on the day, at the place, and within the hours first aforesaid.

(Signed) FRANCIS S. CASTYGLONE,
Notary Public, Kings County.

Certificate filed in New York County.

Mr. Holliday: I now offer in evidence the deposition of George H. Trumpler.

GEORGE H. TRUMPLER, a witness produced on the part of the defendant, of lawful age, being produced, sworn and examined, deposeth and saith:

Direct examination.

By Mr. Holliday:

Q. What is your name?
A. George H. Trumpler.
Q. Where do you reside?
A. Two fifty-three Garfield place, Brooklyn.
Q. State of New York?
A. Yes.
Q. Are you employed by the Mutual Life Insurance Company of New York?
A. I am.
Q. In what department?
A. In the real estate department, at present.
Q. How long have you been employed by the company?
A. Twenty-five years.
Q. In what capacity were you employed during the years 1904 and 1905?
A. As bookkeeper in the cashier's department.
303 Q. What work did you perform there?
A. The principal work was to take charge of the cashier's cash book.
Q. Have you that book here with you for the year 1905?
A. Yes.
Q. Will you examine that book for December, 1905?
A. Yes.
Q. In whose handwriting are the entries therein contained?
A. (Examining book.) In mine.
Q. When were those entries made?
A. They were made on the days they bear date.
Q. Were they made by you in the usual course of business on each day?
A. Yes.
Q. Were they correct and true when you made them?
A. Yes.
Q. Do you find in that book any reference to a loan on policy No. 1,207,072 on the life of Frederick W. V. Blees?
A. Yes, I find a record of the loan made on that policy. The loan number is 54,111, and on December 4th, 1905, that loan evidenced by the agreement was repaid by canceling policy of insurance 1,207,072, and applying its customary cash surrender consideration, on that day amounting to $9,550, in payment of the loan covered by the agreement marked "Defendant's Exhibit B," and when

that was done the loan agreement was canceled and the policy was canceled and surrendered to the company, and this was accomplished by my making the two following entries in the cashier's cash book on December 4th, 1905, viz.: I entered on the list of policies surrendered on December 4th, 1905, policy 1,207,072, and I entered under the list of loans canceled on the 4th of December, 1905, loan No. 54111, which was the loan on that policy of $9,-
304 550. Then I stamped the policy as having been paid on the 4th of December, 1905, and when that was finished the policy of insurance No. 1,207,072 was canceled and surrendered to the company, and its customary cash surrender consideration had been applied to the payment of the loan and the policy ceased to be in force.

Mr. O'Donohoe: Now, just a moment; we ask that that, your Honor, be stricken out, because it reveals nothing but a list of illegal acts.

The Court: You mean the whole answer?

Mr. O'Donohoe: His entire answer.

The Court: Objection overruled; just showing what was done in the office there.

Which objection was by the Court overruled; to which action and ruling of the Court plaintiff, by her counsel, then and there duly objected and excepted and still objects and excepts.

Mr. Holliday (reading deposition):

Q. Was that the customary method in force in the company of cancelling the policy and applying the cash surrender value to the cancellation and payment of the loan?

A. Yes, sir.

Q. And those entries were made by you in the performance of your duties for that purpose?

A. Yes.

Q. From what department did the cashier's department receive this policy?

A. Direct from the policy loan department.

Q. Did the policy at the time it was received by the cashier's department bear upon its back the printed slip initialed "L. P. L."?

A. Yes.

Q. Was it from that slip that you obtained the instructions
305 from which you made your entry in the cash book?

A. Yes.

Q. Where were your duties in connection with the cashier's department during the years 1904 and 1905 all performed?

A. At the home office of the Mutual Life Insurance Company of New York, at Nos. 32-34 Nassau street, in the Borough of Manhattan, City and State of New York, and all of these entries and all of these duties I performed at the home office.

Q. I call your attention to the fact that on the back of said policy, Defendant's Exhibit "A," is a blue stamp reading, "Paid December

4th, 1905," and ask you if you know where that stamp was affixe to the said policy?

A. That was the stamp that we used in the cashier's departmen for stamping policies that had been surrendered or disposed of.

(Signed) GEO. H. TRUMPLER.

Subscribed and sworn to before me on the day, at the place, and within the hours first aforesaid.

(Signed) FRANCIS S. CASTYGLONE,
Notary Public, Kings County.

Certificate filed in New York County.

Mr. Holliday: Gentlemen of the jury, the slip initialed "L. P. L." referred to in Mr. Trumpler's deposition I have just read, is this slip pasted here on the bottom of this policy which you examined: I will hand it to you again. The stamp "Paid" that he refers to is this blue stamp up here. It is on the policy.

Mr. Holliday: Now, if your Honor please, I wish to offer in evidence the deposition of Mr. Allan McCulloh.

306 ALLAN MCCULLOH, a witness produced on the part of the defendant, of lawful age, being produced, sworn and examined, deposeth and saith:

Direct examination.

By Mr. Holliday:

Q. Please state your name, residence and occupation.

A. My name is Allan McCulloh; my residence is New York City, and I am a practicing lawyer.

Q. How long have you been engaged in the practice of law?

A. Thirty-five years and upwards.

Q. What is your present position, if any, with relation to any insurance company?

A. I am one of the general counsel for the Equitable Life Assurance Society of the United States.

Q. How long have you been connected with that company, either as general counsel or otherwise?

A. Ever since I was admitted to the bar.

Q. Are you familiar with the insurance law of the State of New York?

A. I am.

Q. Do you feel that you are qualified to give an opinion as to the insurance law of New York as applied to policies of insurance and loan agreements?

A. I do.

Q. I hand you original policy No. 1,207,072, issued by the Mutual Life Insurance Company of New York on the life of Frederick W. V. Blees, bearing the date September 29th, 1901, which policy is marked in red ink "Defendant's Exhibit A," and with said policy I

hand you a loan agreement bearing the date October 12th, 1904, marked in red ink "Defendant's Exhibit B," said agreement being executed by Frederick W. V. Blees and Mary S. Blees. Now,
307 I will ask you to examine these two papers, the policy and the agreement, and then to state whether in your opinion these two agreements are valid agreements under the laws of the State of New York (handing witness papers)?

Mr. O'Donohoe: Now, we object to that question, your Honor, on the sundry grounds that we have stated when the defendant began presenting this case.

The Court: I have the objection before me—that objection you made just before recess?

Mr. O'Donohoe: Yes, your Honor.

The Court: That objection I will sustain on the ground that it is a waiver, the waiver in pleading; and that the facts in my opinion were not properly stated in the last opinion—207 Southwestern—proceeding on the theory that it is a Missouri contract, and that the defense, as I said, was waived by going to trial on the original theory, defending on the original theory.

Mr. O'Donohoe: That the Missouri laws were applicable?

The Court: What is that?

Mr. O'Donohoe: That the Missouri laws control the case?

The Court: Yes.

Which objection was by the Court sustained: to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

Mr. Holliday: I will, of course, save my exception to your Honor's ruling, and make my offer of proof of the balance of this deposition of Mr. Allen McCulloh, in order to prove that his testimony was that the loan agreement in suit was a valid obligation under
308 the laws of the State of New York, and that the action of the company taken thereunder was valid and proper under the laws of the State of New York. I therefore offer in evidence the rest of the deposition of Mr. McCulloh.

Mr. O'Donohoe: The same objections.

The Court: Renewed, and sustained.

Which objection was by the Court sustained; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

The part of said deposition of Allen McCulloh so excluded by the Court was as follows:

"Q. I hand you original policy No. 1,207,072, issued by the Mutual Life Insurance Company of New York on the life of Frederick W. V. Blees, bearing the date September 29th, 1901, which policy is marked in red ink, 'Defendant's Exhibit A,' and with said policy I hand you a loan agreement bearing the date October 12th, 1904, marked in red ink, 'Defendant's Exhibit B,' said agreement

being executed by Frederick W. V. Blees and Mary S. Blees. Now, I will ask you to examine these two papers, the policy and the agreement, and then to state whether, in your opinion, these two agreements are valid agreements under the laws of the State of New York (handing witness papers)."

(Objections by plaintiff's counsel are noted in italic type.)

We object to the questions because the laws of New York have no bearing in the case.

309 "A. (After examining paper.) I have examined the two papers mentioned in your question and would say that they are valid agreements under the law of the State of New York."

We ask that the answer be stricken out for the same reason.

"Q. Please refer to that part of the loan agreement, Defendant's Exhibit 'B,' which provides that in the event of default in the payment of the loan therein referred to the company has the right to cancel the policy and apply the surrender value to the payment of the loan without demand and without notice, and state what was the law of New York on the 12th day of October, 1904, as to the rights of the company under that agreement."

The question is objected to because the laws of New York are inapplicable.

"A. In the event mentioned the company had the right, without notice and without demand, to cancel the policy and apply the cash surrender consideration or value to the payment of the loan with interest. There is in the agreement a provision to that effect, and under the law of this State the company was under no obligation or duty to give the insured any notice or make any demand for payment before canceling the policy as stipulated in the loan agreement which is marked 'Defendant's Exhibit B.'"

We ask that the answer be stricken out for the same reason.

310 "Q. Will you state what has been the law of the State of New York upon this question from October 12th, 1904, down to the present time?"

Plaintiff objects, since the laws of the State of New York are inapplicable.

"A. The law has been unchanged. It is the same now as it was on October 12th, 1904. As a matter of fact, I would say that the law in this respect has been unchanged for many years prior to the date of the loan agreement, and even prior to the date of the policy itself."

We ask that the answer be stricken out because the laws of New York are in no way applicable.

"Q. Please state whether or not there is any statute or any rule of common law in the State of New York, to your knowledge, which

renders this loan agreement, or any of its provisions, invalid or ineffective."

Plaintiff objects, because the laws of New York are inapplicable.

"A. There is no such statute and there is no rule of common law to that effect."

We move that the answer be stricken out, for the reason that the laws of Missouri control here.

"Q. Please state whether or not it is the law of New York that an agreement such as Defendant's Exhibit 'B' is valid."

Objected to, as the laws of New York are inapplicable.

"A. It is valid under the law of the State of New York."

311 *We move that the answer be stricken out, for the same reason.*

"Q. Can you recall any particular decisions of the courts of the State of New York upon which you predicate your opinion?"

Objected to, because the decisions of New York have no application.

"A. I recall one decision which involved the validity of a loan agreement, and that was rendered by our Court of Appeals in the case of Clare against The Mutual Life Insurance Company of New York, in 1911, and is reported in Volume CCI, New York Reports, page 492. I might say in this connection that there are practically no decisions upon the question of the validity of these contracts, because the validiay thereof has rarely, if ever, been questioned. I know of no case, reported or otherwise, where the validity of these loan agreements was successfully questioned in the courts of this State."

We move that the answer be stricken out, for the same reason.

"Q. Was there, at the date of this loan agreement, namely, October 12th, 1904, or has there since been, to your knowledge, any statute or rule of common law in effect in New York, rendering invalid the provision of this agreement, authorizing the company, upon default, without demand and without notice, to cancel the policy?"

We object to the question, for the reason the laws of New York are inapplicable.

312 "A. There was no such statute or rule of common law in this State."

We move that the answer be stricken out, for the same reason.

"Q. Where a loan is made by an insurance company to the holder of a policy of insurance, and the loan agreement contains a provision

to this effect: 'In the event of default in the payment of said loan on the date hereinabove mentioned, the company is hereby authorized, at its option, without notice and without demand for payment to cancel said policy and apply the customary cash surrender consideration then allowed by the company for the surrender for cancellation of similar policies, namely, $9,550, to the payment of said loan with interest, the balance, if any, to be payable to the parties entitled thereto on demand, or the company may, at its own option renew the said loan for one year or less period on the written request of any one of the parties of the second part hereto and without any further notice to any one of the parties of the second part,' what was the law of the State of New York on the 12th day of October, 1904, and what has it since been as to the right of the company to enforce that agreement by cancellation of the policy, without demand and without notice, on default on maturity in the payment of the loan?"

Question objected to, because the laws of New York are inapplicable.

"A. Under the law of the State of New York the company had the right, on the date mentioned, to cancel and surrender the
313 policy and apply the surrender value in accordance with the terms of the agreement. The law is the same today, there having been no change therein during the period mentioned."

We ask that the answer be stricken out, for the same reason.

"Q. Are you familiar generally with the form of loan agreement in use by insurance companies in cases where loans are made to holders of policies of life insurance?

A. I have had a great deal to do with the forms of such agreements, have prepared them and studied them. The agreements used by The Equitable Society I have prepared and been familiar with ever since they were originally used. The agreements used by the other larger companies, and some of the smaller ones, I have examined from time to time, and think I can say that I am very familiar, if not with all the forms, certainly with the substance of the forms generally used by insurance companies in making loans on policies to the holders of such policies.

"Q. Please state whether the loan agreement, Defendant's Exhibit 'B', is, in substantial respects, about the form of loan agreement commonly used by leading life insurance companies?"

Objected to, because not tending to prove any issue in the case.

"A. (Examining Defendant's Exhibit 'B') In form and substance, the agreement is, substantially the same as similar forms used by the leading insurance companies. Of course, there are variations in certain forms, depending somewhat upon the kinds of
314 policies pledged, or other matters which might make it necessary to slightly vary the language of the agreement."

We move that the answer be stricken out, for the same reason.

Finally, we move that the entire evidence of this witness—Allan McCulloh—be stricken out, for the reasons: (1) *The laws of New York are inapplicable and not pleaded.* (2) *The applicatory laws are those of Missouri.* (3) *The witness is not qualified.* (4) *The questions are leading and ask for conclusions.* (5) *The laws of New York, if applicable, were waived for failure to have invoked them in the first or second answer.*

ALLAN McCULLOH.

Subscribed and sworn to before me, on the day, at the place, and within the hours first aforesaid.

FRANCIS S. CASTYGLONE,
[SEAL.] *Notary Public, Kings County.*

Certificate filed in New York County.

Mr. Holliday: I next offer in evidence the deposition of James H. McIntosh.

315 JAMES H. MCINTOSH, a witness produced on the part of the defendants, of lawful age, being produced, sworn and examined, deposeth and saith:

Direct examination.

By Mr. Holliday:

Q. Will you state your name and residence?
A. James H. McIntosh; I reside in New York City, New York.
Q. What is your business?
A. I am an attorney and counselor at law.
Q. How long have you been engaged altogether in the practice of the law?
A. Since 1886, in June.
Q. How long have you been engaged in the practice of the law in New York City?
A. More than thirteen years.
Q. What connection, if any, have you had with insurance law as a specialty?
A. For more than thirteen years I have been in the employ of the New York Life Insurance Company as its chief law officer and its general counsel.
Q. How long have you been its general counsel?
A. The title "general counsel" has only existed for some eight years, but I have been its chief law officer for more than thirteen years.
Q. Where did you pursue your law studies before entering practice?
A. In Cleveland, Ohio.
Q. Are you familiar with the insurance law in the State of New York?
A. Yes.

Q. Do you feel that you are qualified as an expert to testify as to the insurance law of the State of New York?

A. Why, for more than thirteen years I have not done any
316 sort of business except law connected with the insurance business, and I believe that I am qualified to speak about the insurance law of New York and the insurance law of most every other jurisdiction in the country.

Q. I hand you two papers, one purporting to be a policy of insurance, being numbered 1,207,072, bearing date September 29, 1901, issued by the Mutual Life Insurance Company of New York on the life of Frederick W. V. Blees in the sum of $50,000, and referred to in this deposition as Defendant's Exhibit "A", and the other a loan agreement which is now attached to said policy bearing date the 12th day of October, 1904, purporting to be executed by the insured, Frederick W. V. Blees, and Mary S. Blees, his wife, and referred to in these depositions as Defendant's Exhibit "B". I desire you to examine these papers and state in the first instance whether each of those papers is a valid and legal agreement under the laws of the State of New York?

Mr. O'Donohoe: We make the same objection, your Honor.

The Court: There will be the same ruling as to that testimony of Mr. McCulloh, Allan McCulloh.

Which objection was by the Court sustained; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

Mr. Holliday: Save my exception; and I now make my offer of proof of the rest of the deposition of Mr. James H. McIntosh, to show that he testified that the loan agreement was valid under the
laws of the State of New York and the provisions thereof
317 were valid, and that the action taken by the defendant company thereunder on the failure to pay the loan was valid and proper under the laws of the State of New York.

Mr. O'Donohoe: We make the same objections, your Honor.

The Court: Same ruling.

Which objection was by the Court sustained; to which action and ruling of the Court, defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

The portion of said deposition of James H. McIntosh so excluded by the Court was as follows:

(Objections by plaintiff's counsel are noted in italic type.)

"Q. I hand you two papers, one purporting to be a policy of insurance, being numbered 1,207,072, bearing date September 29, 1901, issued by The Mutual Life Insurance Company of New York on the life of Frederick W. V. Blees in the sum of $50,000, and referred to in this deposition as Defendant's Exhibit 'A,' and the other a loan agreement which is now attached to said policy bearing date the 12th day of October, 1904, purporting to be executed by the insured, Frederick W. V. Blees, and Mary S. Blees, his wife, and referred to in these depositions as Defendant's Exhibit 'B.' I desire you to examine

these papers and state in the first instance whether each of those papers is a valid and legal agreement under the laws of the State of New York?"

Objected to because calling for a conclusion, and the laws of New York are inapplicable.

318 "A. (Examining and reading Defendant's Exhibit 'A' and Defendant's Exhibit 'B') I have read them.

Q. What is your answer to the question?

A. I have read the papers and they are a legal contract under the laws of the State of New York."

Objected to for the same reasons.

"Q. Referring particularly to the loan agreement, you may state whether or not any of the provisions of that agreement contravene in any respect any statute or common law rule of the State of New York."

Objected to because the question calls for a conclusion and the laws of New York are inapplicable.

"A. No, they do not."

We move that the answer be stricken out for same reasons.

"Q. Are you able to refer to any statute or decision of the State of New York upon which you predicate your opinion as to the validity of the two agreements shown you?"

The laws of New York are inapplicable, and hence the question is objected to.

"A. The statutes of New York for many years—for more than twenty years—have expressly authorized life insurance companies to make loans such as these, but without any statutory authority I am satisfied that the company would have power to make such a loan anyhow. The common law of England is in force in the State of New York with respect to pledges, and this loan agreement
319 which you have shown me is a valid contract under the common law of pledge, but it is also valid under the decisions of the courts of New York. There never have been many decisions on the subject because contracts of this kind have been very rarely questioned in the State of New York. My company, the New York Life, has a great many contracts of this kind. We have more than $150,000,000 loaned out on such contracts as this, and I cannot recall that we ever had a lawsuit in the State of New York or that the validity of our contracts has ever been questioned. There are two or three cases in New York. One is the case of Clare against The Mutual Life Insurance Company in 201 New York 492, a decision in 1911 by the Court of Appeals of New York, which is the highest court of the State of New York. That same case was also passed upon by the Appellate Division of New York and the report of it will be found in the case of Clare against The Mutual Life Insurance

Company, 128 Appellate Division 908. Also, there is another case in which the Mutual Life contract was involved decided as far back as 1902, the case of Palmer against The Mutual Life Insurance Company of New York, 38 Miscellaneous 318, a decision by Mr. Justice Fitzgerald."

Objected to as not responsive, and the laws of New York are not applicable.

"Q. Under the terms of the loan agreement that I have just shown you, will you state what the law of State of New York was on the 29th day of September, 1905, as to the right of the company on nonpayment of the loan to cancel the policy without de-
320 mand or notice and apply the surrender value to the payment of the loan."

Objected to; the laws of New York are inapplicable.

"A. The law of New York on this subject at that time was the common law of pledge, under which, after the debt became due, the holder of the security was authorized to foreclose the pledge after demand and notice unless they were waived, and without demand and notice if demand and notice were waived. This contract waives demand and notice, and so under the law of New York it was perfectly proper for the company to foreclose the pledge and pay the debtors for it what they agreed upon in the contract."

We move that the answer be stricken out because consisting of conclusions only, and the laws of New York are in no way applicable.

"Q. What statute or rule of the common law was there in force on September 29, 1905, which, under the terms of that contract, would have required the company, before canceling the policy and applying the surrender value to the payment of the loan, to make demand upon the insured or to give notice of its intention so to do?"

Objected to because the laws of New York are inapplicable.

"A. There was none when the notice was waived in the contract."

We move that the answer be stricken out for the same reason.

321 "Now, you have stated the law of New York in relation to the matters referred to on the 12th day of October, 1904, the date of this contract. You may state what change, if any, there had been made in that law up to and including the year, say, 1905."

Objected to for the same reason.

"A. None."

"Q. And whether or not the law as you have stated it remains the law of New York up to this time?"

Objected to for the same reason.

"A. The law as I have stated it has always been the law of New York and is the law now."

We move that the answer be stricken out for the same reason.

"Q. And was the law, of course, in 1904 and 1905?"

Objected to for the same reason and because leading.

"A. Yes, sir."

"Q. Where a loan is made by an insurance company to the holder of a life policy issued by it, evidenced by a loan agreement executed by the insured and the beneficiary, and the loan agreement contains a provision to this effect: 'In the event of default in the payment of said loan on the date hereinabove mentioned the company is hereby authorized at its option without notice and without demand for payment to cancel said policy and apply the customary cash-surrender consideration then allowed by the company for the surrender for cancellation of similar policies, namely, $9,550, to the pay-
322 ment of said loan with interest, the balance, if any, to be payable to the parties entitled thereto on demand, or the company may at its own option renew the said loan for one year or less period on the written request of any one of the parties of the second part hereto and without further notice to any one of the parties of the second part,' what was the law of the State of New York on the 29th day of September, 1905, under an agreement such as I have read on non-payment of the loan at maturity to cancel the policy and apply the surrender value to the payment of the loan where the policy itself had been assigned to and pledged with the company as security for the loan?"

Objected to because the laws of New York are inapplicable.

"A. The law of New York authorized the company to do that."

We move that the answer be stricken out for the same reason.

"Q. And whether or not under the law of New York the company had the right, without demand and without notice, to cancel the policy and apply the surrender value in payment of the loan?"

Objected to for the same reason.

"A. It certainly had.

Q. Are you familiar with the forms of loan agreements that are customarily used in making loans by insurance companies to policyholders?

A. I think so.

Q. You may state whether or not the loan agreement that I have shown you, and particularly the part of that agreement that I
323 have read, are in the form usually used by insurance companies in similar cases."

Objected to as immaterial.

"A. They are substantially the same. It is exactly the same in substance and effect with respect to the satisfaction of indebtedness in the event of default."

We move that the answer be stricken out for the same reason.

"Q. Where an insurance policy or other property is pledged for the security of the loan under a written agreement, giving to the lender the right, without demand and without notice, on the non-payment of the loan at maturity, to sell the pledged property or convert it into money and apply the proceeds to the payment of the loan, is there any statute or rule of comman law in the State of New York that makes such an agreement illegal?"

Objected to because the laws of New York are inapplicable.

"A. No.

Q. And under such an agreement as I have stated in the preceding question, what is the law of the State of New York as to the right of the lender to realize on the property pledged for the security of the debt according to the terms of the agreement?"

Objected to for the same reason.

"A. When, as in this case, the parties agree between themselves on the price which the lender is to pay in the event of fore-
324 closure, the lender prays that price in accordance with that agreement, and that constitutes a valid foreclosure of the pledge."

We move that the answer be stricken out for the same reason.

"JAMES H. McINTOSH.

Subscribed and sworn to before me on the day, at the place and within the hours first aforesaid.

[SEAL.] FRANCIS S. CASTYGLONE,
Notary Public, Kings County.

Certificate filed in New York, No. 272."

Finally, we move that the evidence of this witness (James H. McIntosh) be stricken out, for the reasons, (1) *the witness is not qualified;* (2) *the reports of the country, Missouri included, prove the incompetency of this witness;* (3) *the obvious defective mentality of the witness;* (4) *this well-defined case of exaggerated ego;* (5) *the failure of the defendant to plead the laws of New York;* (6) *the laws of New York are inapplicable;* (7) *the policy is a Missouri contract and governed by Missouri law;* (8) *the questions are leading and call for conclusions;* (9) *the laws of New York were waived by defendant's failure to timely plead them, if otherwise applicable.*

Mr. Holliday: I now offer in evidence, your Honor, the deposition of James H. McIntosh, taken in New York City on April 24th, 1919.

325 JAMES H. MCINTOSH, of lawful age, being produced, sworn and examined on the part of the defendant, deposeth and saith:

Direct examination.

By Mr. Holliday:

Q. Where do you reside?
A. New York City.
Q. What is your profession?
A. I am an attorney and counselor-at-law.
Q. Mr. McIntosh, I believe that you have already given your deposition in this case of Mary S. Liebing against the Mutual Life Insurance Company of New York?
A. Yes, sir; I have.
Q. And in the course of that deposition you stated your qualifications to give testimony as to the insurance laws of the State of New York?
A. Yes, sir; as I remember it.
Q. At the time of your prior deposition, Mr. McIntosh, you were shown two papers, one purporting to be a policy of insurance, No. 1,207,072, bearing date September 29th, 1901, issued by the Mutual Life Insurance Company of New York on the life of Frederick W. V. Blees, in the sum of fifty thousand dollars, and referred to in said deposition as Defendant's Exhibit "A", and the other a loan agreement, which is now attached to said policy, bearing date October 12th, 1904, purporting to be executed by the insured, Frederick W. V. Blees and Mary S. Blees, his wife, and referred to in said deposition as Defendant's Exhibit "B". I again hand you both of these papers so that you may refresh your recollection concerning the same by examining them.

A. (Witness examines Exhibits "A" and "B".) I have ex-
326 amined the exhibits and refreshed my recollection from them.

Q. At the time of your former deposition in this case you stated, referring to the loan agreement, being the above-mentioned Defendant's Exhibit "B", that in your opinion none of the provisions of that agreement contravened in any respect any statute or common-law rule of the State of New York. Is that still your answer?

Mr. O'Donohoe: We object to that for the same fifteen reasons hitherto stated.

The Court: Same ruling. In view of the first decision, which was res adjudicata in this case. For the further reason, I say, the decision in the 269th Missouri, 509, was res adjudicata in this case.

Which objection was by the Court sustained; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted, and still objects and excepts.

The Court: You may make your offer.

Mr. Holliday: I wish, your Honor, to make my offer of proof of the rest of this deposition of Mr. McIntosh, in order to establish the points therein brought out. I don't know whether Mr. O'Donohoe wants me to state all the points.

Mr. O'Donohoe: We make the same objections to it.

Mr. Holliday: Do you wish me to complete my offer of proof by

stating everything that is in this deposition; I am offering the rest as my offer of proof, the rest of the deposition from that question on.

Mr. O'Donohoe: I think that will be sufficient offer; we object to it on the same grounds.

327 The Court: Same ruling.

Which objection was by the Court sustained; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted, and still objects and excepts.

The portion of said deposition of James H. McIntosh so excluded by the Court was as follows:

Q. At the time of your prior deposition, Mr. McIntosh, you were shown two papers, one purporting to be a policy of insurance, No. 1,207,072, bearing date September 29th, 1901, issued by the Mutual Life Insurance Company of New York on the life of Frederick W. V. Blees, in the sum of fifty thousand dollars, and referred to in said deposition as Defendant's Exhibit "A", and the other a loan agreement, which is now attached to said policy, bearing date October 12th, 1904, purporting to be executed by the insured, Frederick W. V. Blees, and Mary S. Blees, his wife, and referred to in said deposition as Defendant's Exhibit "B". I again hand you both of these papers so that you may refresh your recollection concerning the same examining them?

A. (Witness examines Exhibits "A" and "B".) I have examined the exhibits and refreshed my recollection from them.

Q. At the time of your former deposition in this case you stated, referring to the loan agreement, being the above-mentioned Defendant's Exhibit "B", that, in your opinion, none of the provisions of that agreement contravened in any respect any statute or common law rule of the State of New York. Is that still your answer?

A. It is.

328 Q. I ask you, Mr. McIntosh, whether, in making that answer, you had in mind the laws of the State of New York in force at the time of the issuance of this policy, namely, 1901, and at the time this loan was made, namely, 1904, and at the time of the maturity of the loan, namely, 1905, respecting usury?

A. I had; I had in mind all the laws of New York that would bear on the subject.

Q. I hand you Volume II of the Revised Statutes, Code and General Laws of the State of New York, third edition of Clarence F. Birdseye of the New York Bar, published in New York by Baker, Voorhis & Co., in 1901, and I ask you to turn to page 1929 thereof, and examine the first three sections of the laws there appearing under the heading of "Interest"?

A. (Examining.) I have examined the statute which you have handed me and the sections relating to interest referred to in your question.

Mr. Holliday: I request now that the notary, in writing this deposition, insert the three sections referred to.

The sections read as follows:

"1. Legal Rate.—The rate of interest upon the loan or forbearance of any money, goods or things in action, shall be six dollars upon one hundred dollars, for one year, and after that rate, for a greater or less sum, or for a longer or shorter time. But nothing herein contained shall be so construed as to in any way affect any contract, or obligation, made before the passage of this Act.

"2. Greater Interest Prohibited.—No person or corporation shall, directly or indirectly, take or receive in money, goods or things in action, or in any other way, any greater sum or greater
329 value, for the loan or forbearance of any money, goods or things in action, than is above prescribed.

"3. Recovery of Excess by Borrower.—Every person who, for any such loan or forbearance, shall pay or deliver any greater sum or value than is above allowed to be received, and his personal representatives, may recover in an action against the person who shall have taken or received the same, and his personal representatives, the amount of the money so paid or value delivered, above the rate aforesaid, if such action be brought within one year after such payment or delivery."

Q. Having examined these three sections, and bearing them in mind in connection with the terms of this loan agreement, Defendant's Exhibit "B," and the policy, Defendant's Exhibit "A," pledged thereunder, will you state whether, in your opinion, the terms of said loan agreement and the pledge of the policy thereunder in any way violate any of said sections of said statutes?

A. They do not. The statute authorizes the interest called for in the loan agreement, Defendant's Exhibit "B." Defendant's Exhibit "B" calls for interest at five per cent in advance, and the statute authorizes any rate of interest up to and including six per cent. Without any statement as to whether it shall be six per cent in advance or six per cent at the expiration of any given period.

Q. I will further ask you, Mr. McIntosh, whether in making your reply at the time of taking your first deposition in this case, to the effect that the loan agreement was valid, you had in mind the provision of the laws of the State of New York in regard to the power of the Mutual Life Insurance Company of New York to
330 enter into such an agreement?

A. Certainly, I did.

Q. I show you a volume entitled, "Insurance Laws of New York," Hamilton, 1901, at page 10, section 16, and I ask you to examine the same?

A. (Examining volume.) I have examined it.

Q. Will you kindly state whether or not said section contains any authority for the making of loans, and if so, what it is?

Mr. O'Donohoe: We object to that; the section speaks for itself.

A. It does. It authorizes such transactions in the sentence of the section next to the last, as follows: "Any life insurance company

may lend a sum not exceeding the lawful reserve which it holds upon any policy, on the pledge to it of such policy and its accumulations as collateral security."

Mr. Holliday: I ask now that the notary copy into this deposition said Section 16 of Chapter 690 of the New York Insurance Law, approved by the Governor May 18th, 1892, as the same appears on pages 10 and 11 of the Insurance Laws, New York, Hamilton, 1901.

The section reads as follows:

"Sec. 16. Investment of Capital and Surplus.—The cash capital of every domestic insurance corporation required to have a capital, to the extent of the minimum capital required by law, shall be invested and kept invested in the kinds of securities in which deposits with the superintendent of insurance are required by this chapter to be made. The residue of the capital and the surplus money and funds of every domestic insurance corporation over and above its capital, and the deposit that it may be required to
331 make with the superintendent, may be invested in or loaned on the pledge of any of the securities in which deposits are required to be invested or in the public stocks or bonds of any one of the United States, or except as herein provided, in the stocks, bonds or other evidence of indebtedness of any solvent institution incorporated under the laws of the United States or of any state thereof, or in such real estate as it is authorized by this chapter to hold; but no such funds shall be invested in or loaned on its own stock or the stock of any other insurance corporation carrying on the same kind of insurance business. Any domestic insurance corporation may, by the direction and consent of two-thirds of its board of directors, managers or finance committee, invest, by loan or otherwise, any such surplus moneys or funds in the bonds issued by any city, county, town, village or school district in this State pursuant to any law of this State. Any corporation organized under the ninth subdivision of section seventy of the insurance law, for guaranteeing the vality and legality of bonds issued by any state, or by any city, county, town, village, school district, municipality or other civil division of any state, may invest, by loan or otherwise, any of such surplus moneys or funds in the bonds which they are authorized to guarantee. Every such domestic corporation doing business in other states of the United States or in foreign countries, may invest the funds required to meet its obligation incurred in such other states or foreign countries and in conformity to the laws thereof, in the same kind of securities in such other states or foreign countries that such corporation is by law allowed to invest in, in this State. Any life insurance company may lend a sum not exceeding the
332 lawful reserve which it holds upon any policy, on the pledge to it of such policy and its accumulations as collateral security. But nothing in this section shall be held to authorize one insurance corporation to obtain, by purchase or otherwise, the control of any other insurance corporation."

Q. Mr. McIntosh, I ask you to examine in the same book section 37 of the said laws, at page 23?

A. (Examining.) I have examined the section.

Q. I ask you to state whether or not section 37 applies to the Mutual Life Insurance Company of New York?

Mr. O'Donohoe: I object to the question as calling for the conclusion of the witness. That is a matter for the courts to construe and decide.

A. It does.

Mr. Holiday: I ask that the notary here copy in *in* full Section 37 of Chapter 690 of said Insurance Law, as it appears on pages 23 and 24 of said Insurance Laws of New York, Hamilton, 1901.

The section reads as follows:

"Sec. 37. Corporations Heretofore Formed.—Any domestic insurance corporation heretofore incorporated or extended under the provisions of any general or special law of the State is hereby brought under all of the provisions of this chapter relating to such corporation, except that its capital may continue of the amount named in its charter during the existing term thereof, unless it extends its business to other kinds of insurance, and it shall be entitled to all privileges granted by such charter not authorized by this chapter.

333 A greater number than a majority of the directors of any such specially chartered corporation shall not be required to be residents of this State, notwithstanding the provisions of any special law."

Q. Mr. McIntosh, I ask you to examine sections 17 and 18 of the charter of the Mutual Life Insurance Company of New York, being chapter 246, An Act to incorporate The Mutual Life Insurance Company of New York, passed April 12th, 1842.

A. (Examining charter.) I have examined the sections. I have been familiar with those sections for a great many years. They form a part of the original charter of the New York Life Insurance Company, of which I am counsel.

Mr. Holliday: I ask that the notary here copy in *in* full in this deposition, sections 17 and 18 of said charter of the Mutual Life Insurance Company of New York.

The sections read as follows:

"Sec. 17. No policy shall be issued by said company until application shall be made for insurance in the aggregate of five hundred thousand dollars at least, and the trustees shall have the right to purchase for the benefit of the company all policies of insurance or other obligations issued by the company.

"Sec. 18. The Legislature may at any time alter or repeal this act."

Q. Mr. McIntosh, I ask you if in your opinion said section 17 conferred on the Mutual Life Insurance Company of New York the power to purchase its policies from its policyholders?

A. Certainly, it does.

Q. And I ask you whether in your opinion said section of the charter authorized the making of the loan agreement, Defendant's
334 Exhibit "B" in this case, and to pledge the policy thereunder?

A. In my opinion a life insurance company could loan money on the pledge of its policies as collateral security without any specific authorization to that effect in its charter, and that even if that were not so, the two provisions of the charter, sections 17 and 18, and section 16 of the insurance law, to which you have already referred, and section 37, certainly authorized such transactions. Perhaps I might further say that at the time this charter was passed as a speical law by the Legislature of New York, the Revised Statutes of New York contained a provision, and the Constitution of the State, both contained provisions authorizing the Legislature to alter, amend or repeal the charters of corporations created by legislative act or by general law.

Q. Mr. McIntosh, I call your attention to the fact that the plaintiff in this case, Mary S. Liebing, was at the time of the execution of said loan agreement, Defendant's Exhibit "B," the wife of the insured, Frederick W. V. Blees, and that she joined in the execution of the loan agreement. Also, that at that time the policy in suit, which had originally been issued as payable to the estate of Frederick W. V. Blees, had been by the insured assigned to the plaintiff, then Mary L. Blees. Would that fact, that she at the time of executing this loan agreement was the wife of the insured, or that she had children then living, affect in any way the validity of this loan agreement?

A. Not at all. She had just as much right to make the loan agreement and obtain the loan as any other owner of collateral.

Q. Mr. McIntosh, I will ask you to examine sections 21 and
335 22 of Article III of the Domestic Relations Law of 1896, Chapter 272.

A. (Examining.) I have examined the sections and I am familiar with them anyhow.

Q. I ask you whether those were the laws in force at the time of the issuance of this policy in 1901, of the assignment of same in 1904, and of the cancellation of this policy for failure to pay loan in 1905?

A. They were.

Mr. Holliday: I ask that the notary here insert in full in this deposition said sections 21 and 22 referred to in the testimony of the witness.

They read as follows:

"Sec. 21. Powers of Married Woman.—A married woman has all the rights in respect to property, real or personal, and the acquisition, use, enjoyment and disposition thereof, and to make contracts

in respect thereto with any person, including her husband, and to carry on any business, trade or occupation, and to exercise all powers and enjoy all rights in respect thereto and in respect to her contracts, and be liable on such contracts, as if she were unmarried; but a husband and wife cannot contract to alter or dissolve the marriage or to relieve the husband from his liability to support his wife.

"Sec. 22. Insurance of Husband's Life.—A married woman may, in her own name, or in the name of a third person, with his consent, as her trustee, cause the life of her husband to be insured for a definite period or for the term of his natural life. Where a married woman survives such period or term she is entitled to receive the insurance money, payable by the terms of the policy, as her separate property, and free from any claim of a creditor or representa-
336 tive of her husband, except, that where the premium actually paid annually out of the husband's property exceeds five hundred dollars, that portion of the insurance money which is purchased by excess of premium above five hundred dollars is primarily liable for the husband's debts. The policy may provide that the insurance, if the married woman dies before it becomes due and without disposing of it, shall be paid to her husband or to his, her or their children, or to or for the use of one or more of those persons; and it may designate one or more trustees for a child or children to receive and manage such money until such child or children attain full age. The married woman may dispose of such policy by will or written acknowledged assignment to take effect on her death, if she dies thereafter leaving no descendant surviving. After the will or the assignment takes effect, the legatee or assignee takes such policy absolutely.

"A policy of insurance on the life of any person for the benefit of a married woman, is also assignable and may be surrendered to the company issuing the same, by her, or her legal representative, with the legal consent of the assured."

Q. Mr. McIntosh, it appears from the evidence in this case, that while the due date of the loan, as evidenced by Defendant's Exhibit "B," the loan agreement, was September 29th, 1905, the actual cancellation and surrender of the policy for failure to pay the loan did not occur until November 15th, 1905, and I ask you whether that fact, in your opinion, in any way affects the validity of the agreement or of the action taken by the company thereunder?

A. Not at all.

337 Cross-examination.

By Mr. O'Donohoe:

Q. You think it does not affect it at all?

A. I know it does not.

Q. Are you familiar with the case of Stevens against the Mutual Life Insurance Company, reported in 183 Appellate Division, New York, 629?

A. Yes.

Q. What was held in that case?

Mr. Holliday: At this point counsel in this case objects to any reference to the case of Stevens against Mutual Life Insurance Company for the reason that said decision is not a final decision, said case being now on appeal in the Court of Appeals of New York and suspended by supersedeas, and for the second reason that the facts in the case are entirely dissimilar to the facts in the case at bar.

A. I could not say that anything was held in the case of Stevens against the Mutual Life Insurance Company, using the word "held" in the sense of an expression of the law of New York, because the case of Stevens against the Mutual Life Insurance Company of New York, as reported in 183 Appellate Division, 629, was a case decided by an intermediate court in which the judges were divided in their opinion about what the holding of the Court should be in that case, the Court standing three to two. I am advised that the case is now pending on appeal in the Court of Appeals, as you said a minute ago, which is the court of last resort here.

Q. Well, the law as announced in that case is the law of New York until it is reversed, is it not?

A. No, I should say not. It would be the law of this case until reversed, but not the law of New York.

Q. Do you think that the law of New York is found
338 in the cases of Toplitz against Bauer, 161 New York 325—whatever is in that case is the law of New York, is it not?

A. Yes, in so far as what in that case bears upon the issues in that case. Anything that may be in the opinion of the Court not directly bearing upon the issues before the Court in the case I would not say was necessarily the law in New York; it might or might not be.

Q. Well, whatever is decided there is the law of New York. That case has not been reversed or overruled, has it?

A. Not that I know of.

Q. Are you familiar with the case of Bailey against the American Deposit and Loan Company, 52 Appellate Division, 402, and further in 165 New York 672?

A. I am familiar with the case of Bailey against Gordon, and have been familiar with it for a long time.

Q. Now, those cases are the law of New York on identical facts or analogous facts?

A. The facts are not at all identical with the facts in dispute here.

Q. I am not asking you that now—I am asking you if those cases are not controlling cases in New York where the facts are similar to the facts in those cases?

A. If the facts were the same, or substantially the same, as the facts in this case, the decision of Bailey against Gordon would have weight as the law of New York.

Q. Well, aren't they the law of New York?

A. They are the law of New York applicable to the facts of the case before the Court in Bailey against Gordon.

Q. And in cases with similar facts?

A. It depends on what you mean by similarity. If the similarity

was one where there was a difference, why it would not be the
339 law of New York applicable to the facts that were similar, but different from the facts in this case.

Q. Now, you have been testifying concerning what the law of the State of New York is. Where did you get those views as to what the laws of New York are?

A. I get my views from the statutes of New York, the Constitution of the State, and the decisions of the Court of Appeals of the State.

Q. You do not consider the Appellate Division of the Supreme Court at all?

A. I would not say that I did not consider it at all, but I did not consider it as necessarily embracing the law of New York, because it is an intermediate court, and they are often wrong and often reversed by the Court of Appeals.

Q. Well, they form the law of New York until reversed, do they not?

A. No, they form the law of the particular case in which the decision is rendered until reversed.

Q. In forming your opinion as to what the law of the State of New York is you have not taken into consideration any of the decisions of the intermediate courts?

A. I would not say that.

Q. Well, what weight do you give to those decisions, if any?

A. Well, not very much weight. If, however, it is a question upon which the Court of Appeals has not passed, the opinions of the Appellate Division are entitled to some weight and consideration, but they are not at all conclusive of what the law of New York is.

Q. So you are not forming your opinions here on the Appellate Division of the Supreme Court?

A. No, sir.

Q. You are disregarding those decisions?

A. I do not disregard those decisions altogether; I give
340 them the consideration that I have intimated in my answers.

Q. I believe that you have stated that under the charter of the defendant company it had the power to lend mony on policies in 1901 and 1904. Are you familiar with sections 9, 10 and 11 of chapter 246 of the laws of the State of New York, 1842?

A. You have not in your question correctly summarized my testimony about what I testified to. What I said was that I thought that any life insurance company had power to lend money to its policyholders on the pledge of their policies as collateral security, without authorization in their charter, but the Mutual Life Insurance Company of New York had such authorization in view of the sections of its charter put in evidence and sections 16 and 37 of the insurance law. Now, with that correction of your question as to what I had testified to, I will go on and answer the question.

Mr. Holliday: Defendant here objects to any reference to said sections 9, 10 and 11 of chapter 246 of the laws of the State of New York, 1842, unless and until it be shown that these sections of the statute were still in force and binding upon the defendant herein

in 1901, at the date of the issuance of this policy, or in 1904, at the time this loan was made, without having been altered, amended or repealed.

A. (Continuing:) I am familiar with those sections.

Q. Those sections, and particularly section 11, give the Mutual Life Insurance Company the power to invest certain portions of the premiums, not to exceed one-half, in the public stock of the United States or of the State of New York. Now, do you know any
341 case or decision in the State of New York permitting the insurer to loan money beyond the power given by the chater?

Mr. Holliday: I object to that question as improper in form.

A. The decisions of the State of New York——

Q. (Interrupting.) The answer first is yes or no.

A. Cases or decisions in New York do not confer corporate powers. Corporate powers are divided from the Legislature, or by implication from what the Legislature puts in a statute.

Mr. O'Donohoe: Will you kindly read the question again. The witness does not understand.

Mr. Holliday: The witness has stated twice on what basis his opinion as to the power or authority of the Mutual Life Insurance Company to make the loan in question.

Q. Will you state whether or not you know of any decision such as I have asked you for?

Mr. Holliday: Objected to for the same reason, that the question previously asked was improper in form and not based on anything concerning the issues in this case.

A. Not unless you would construe decisions which recognize and confirm the authority of such a corporation to make loans, such decisions, for instance, as the case of Clare against the Mutual Life Insurance Company, 201 New York, 492.

Q. Now, was the question concerning the charter or the power to lend money up in the Clare case?

A. Not directly, and my answer says unless you would so construe such a decision which recognized that authority.

342 Q. There wasn't anything in the Clare case about the charter or the powers conferred by the charter, was there?

A. Not that I recall.

Q. Now, you are familiar with the Clare case, I suppose?

A. Oh, yes.

Q. In that case, do you recall that the Court used these words: "The question of the surrender value of the policy is not here?" That is at page 498.

A. That is a sentence quoted from the opinion of the Court in the Clare case.

Q. Now, you believe that the Court knew what it meant by those words?

Mr. Holliday: Objected to as improper in form.

A. Why, certainly.

Q. And, if they meant what the words said, anything said by the Court in reference to the surrender of the policy was dicta, wasn't it?

Mr. Holliday: I object to the question as improper. It is not the proper way to form any basis of opinion or estimate of the law of New York, to take isolated sentences from a particular decision. The decision must be read and construed as a whole.

A. Before counsel made his objection I was going to say that the opinion and statement of facts in the Clare case show for themselves what the issue was in that case, and it would be—I suppose a Missouri court could tell what was decided there as well, if not much better, than I could.

Q. Well, if the question of the surrender value was not in the case, and the Charter was not in the case, then those questions in the Clare case would not lay any basis for your opinion on those questions?

Mr. Holliday: I object to the question as improper in form and improper cross-examination and not relevant to the issues in this case.

343 A. Not unless there was something stated by the Court in the opinion by way of argument which would bear on that subject, and I have not read the opinion over with a view to ascertaining whether or not there was anything of that kind in it.

Q. Are you familiar with the ruling in the case of North River Insurance Company against Lawrence, Third Wendell, New York, 482?

A. I can't say that I was familiar with the case which you have named in the question until just now I have looked it over. I may have read it before, but I do not recall. I mean by that that I have not such familiarity with it that I recall having read it.

Q. Now that you have read it, what did the Court hold?

Mr. Holliday: Objected to for the reason that it appears that the case was decided in 1830, long before the Charter of this company was granted and before any of the applicatory laws were in force and effect. The said case can be of no binding effect in this suit.

A. The Court held that, whereas the act of incorporation of the North River Insurance Company provided that it should not be lawful for the corporation to purchase or discount any bill, bond, note or obligation whatever, or to perform any banking operations, or make purchases or sales of any stock or funded debt created or to be created under any law of the United States, or any particular State, that the plaintiff, the corporation, might lend money upon bond and mortgage, but not on note, and that, to lend money upon an hypothecation of stock and take a note as collateral security, was a subterfuge circumventing the prohibitions of the Charter and unauthorized.

344 Mr. Holliday: I move that the answer be stricken out for the reasons given in the objection to the question, and for the further reason that the case speaks for itself.

Q. Are you familiar with the case of the Life and Fire Insurance Company against the Mechanic Fire Insurance Company, 7 Wendell, New York, 31?

A. I am not familiar with that case, but I have looked it over since you asked me the question.

Q. What did that case hold?

Mr. Holliday: I object to the question for the reason that it appears that this case was decided in the year 1831, long before the Charter of this company was first granted, and before any of the applicatory laws were passed, and cannot have any binding effect, and for the further reason that, whatever the holding of the Court may be, it appears from the decision itself.

A. As I understand it, it holds that the president of the Mechanic Fire Insurance Company was not a duly constituted agent of the company to borrow the money in dispute in that suit.

Q. And that he had acted beyond the charter powers?

A. No, that he had acted beyond his powers as the president of the corporation. That is, that the plaintiff had not shown that he, as president of the defendant, had authority to borrow the money in question.

Mr. Holliday: I move to strike out the answer of the witness for the reasons given in the objection to the question.

Q. Where was the authority to be derived from according to that decision?

Mr. Holliday: Objected to for the reason that it appears
345 that the case was decided in 1831, long before the charter of this company was granted and before any of the applicatory laws were in force and effect.

A. Either from the corporate charter or a resolution of its directors. The trial judge instructed the jury and the Appellate Court affirmed the instruction, that the main question to be decided by them was whether John Franklin was duly constituted the agent of the defendant, and that such agency might be proved either by showing that as president he was authorized by the charter to borrow money, or that he was so authorized by some resolution of the board of directors.

Q. Are you familiar with the case of New York Firemen Insurance Company against Ely and others, 2 Cowan, New York, 678?

Mr. Holliday: I object to that question as it appears that this case was decided in 1824, long before the charter of the Mutual Life Insurance Company was granted, and before the laws applicatory to this case were passed, and it is utterly incompetent, irrelevant and immaterial to any issue in this case.

A. I do not recall having read the case of New York Firemen Insurance Company against Ely, 2 Cowan 678, but I may have read it.

Q. What is held in that case, Mr. McIntosh?

Mr. Holliday: Objected to for the same reasons heretofore given to the former questions, and for the further reason that the decision speaks for itself.

A. The Court seems to hold that a company incorporated for the purposes of insurance and forbidden to carry on any other
346 trade or business, and also forbidden to exercise banking powers in the clause incorporating it, and enumerating the kind of securities upon which it may loan money, and not including promissory notes in such enumeration, has no power to lend money on promissory notes or any other security other than those specifically enumerated.

Mr. Holliday: I move to strike out the answer for the reasons given in the objection to the question.

Q. Are you familiar with the case of Pratt et al. against Short et al., 79 New York 437?

A. Somewhat.

Q. What does that decision hold, Mr. McIntosh?

Mr. Holliday: Objected to for the reasons heretofore given to the other questions, and, further, the decision speaks for itself.

A. It held that the Peoples Safe Deposit and Savings Institute was restricted in its investments to such securities as are specified in its charter, and that its charter did not include a power to invest in commercial paper, and therefore, that as discounting paper was prohibited by statute, under the laws of New York then in force, and any corporation not authorized by law to discount paper, a promissory note discounted by the corporation was void, but that funds so invested by the directors of the corporation were not thereby forfeited but could be recovered from a person borrowing them, although the commercial paper was void.

Mr. Holliday: Now, I move that the testimony of the witness be stricken out for all the reasons heretofore given in the objections to those questions propounded by the attorney for the plaintiff, and for the further reason that even were the loan agreement and pledge of the policy in the case at bar ultra vires, or beyond the
347 charter power of the company, this plaintiff is not in a position to make——

Q. (Interrupting objection.) Do you know, Mr. McIntosh, any decision in the State of New York deciding that an agreement providing that in case of default in the payment of a loan without notice and without demand that the thing pledged or the policy pledged, rather, might be canceled and the surrender value appropriated to repay the loan, where the plaintiff made the point that such a stipulation was

void because operating as an enforced conversion of the thing pledge and cutting off the right of redemption?

A. I think so.

Q. What is that case?

A. The case of Clare against the Mutual Life Insurance Company 201 New York 492, and to the same effect are Palmer against the Mutual Life Insurance Company, 38 New York, Miscellaneous, 318, and Hayes against the New York Life Insurance Company, 124 New York Supplement 792.

Q. Was the point that the loan agreements in those cases, or any one of them, was void because operating as an enforced conversion of the policy or because repugnant to the right of redemption?

A. Well, I suppose every decision that sustains the foreclosure of a pledge would to some extent be a decision on the question that the transaction as carried out was not repugnant to the right of redemption, the foreclosure having cut off the right of redemption.

Q. But did the plaintiff make that particular point in any one of those cases?

A. I understand that point in substance and in effect to be made in the Clare case; of course, not in just the words in which you frame your question.

Q. Is there in the opinion anything about the conversion of
348 the policy or the policy loan agreement being void as cutting off the right of redemption?

Mr. Holliday: Objected to for the reason that the opinion of the Court in the Clare case is the best evidence of what was held there.

A. The Court says in the opinion: "Nor is there any doubt but what the guardian could agree to waive notice and demand of payment. The subject of the contract was a non-negotiable chose in action and not a chattel, and the plaintiff's interest in the policy was a peculiar species of property. The defendant was not bound to maintain the policy, upon the non-payment of the amount of the loan, which equaled its surrender value. The effect of the agreement was to provide for a method of realizing upon the policy, and there can be no legal objection to such an agreement by the guardian. It is always competent for parties to agree between themselves that, in a transaction of loan, notice and demand may be dispensed with." Now, when you take that in connection with one of the points made in the brief of the plaintiff in the case which I have before me, I think it is fairly an affirmative answer to your question. The point in the brief is this: If the order of the Court had authorized the guardian to enter into a contract stipulating that the company might not cancel the policy upon default of payment of the loan, such a contract executed by the guardian of an infant should be held to be against public policy and therefore void.

Q. You know of no other case upon which you base any of your answers except the Clare, the Hayes and the Palmer cases?

A. Oh, yes; my answers are based on other cases than those.

Q. What are those other cases?

A. It would be out of the question for me to give the titles
349 and citations of all the cases from which I derive what I believe to be my knowledge of the laws of New York. Like every other industrious lawyer, I am reading cases a great deal, and I get my knowledge of the law from my general reading of cases, as well as from specific cases. But, for example, one of the questions I was asked was about the validity of the assignment of this policy by the wife under the laws of New York. I mean the assignment as collateral security. My answer to that question is in part based upon the decision of the Court of Appeals of this State in the case of Dannhouser v. Wallensfein, 169 New York, 199, and on the case of Anderson against Goldsmidt, 103 New York 617, and upon the cases cited in those decisions, and other cases the title of which I cannot give. Then I was asked something about the question of usury. My answer to that question was based not only on the Statutes of New York, but on the decisions of the State in the cases of Hartley against Eagle Insurance Company, 222 New York 178; Union Estates Company against Adlon Construction Company, 221 New York 183, and on many other decisions which I cannot now recall.

Q. In the case of Dannhauser against Wallenstein, 169 New York, as I recall, the Court held that a paid-up policy was not a contract independent of the policy?

A. No, it did not hold that.

Q. What did it hold in that case?

A. It held, among other things, that where an assignee of a policy surrenders the policy to the company under a contract right contained in the policy, and receives for it a paid-up policy payable to the assignee, the paid-up policy taken out in lieu of the original
350 policy is not a new contract, but is a continuation of the original contract and is assignable by the wife without the written consent of her husband, she being the assignee of the policy by her husband.

Q. It has been held in a number of New York cases, however, that stipulations and agreements cutting off the right of redemption were void?

Mr. Holliday: I object to the question on the ground that it is not properly framed and not based upon the facts in issue in this case.

A. Not in any such transaction as this and not in any case.

Q. Are you familiar with the case of Mooney against Byrne, 163 New York 86?

A. Yes.

Q. That is a leading New York case, is it not?

A. No.

Q. It is very much cited, is it not, approvingly?

Mr. Holliday: Objected to as not calling for the best evidence.

A. It has been cited. The principles involved in it are very old.

Mr. Holliday: I move to strike out the answer for the reason given in the objection to the question.

Q. Do you know any New York Decisions holding that where greater sum than six per cent per annum, or where an article greater value than the loan and six per cent thereon per annum has been agreed on, that the transaction is valid?

Mr. Holliday: I object to the question on the ground that it improperly framed, and not based upon any facts in issue in this case, and utterly irrelevant.

A. Yes.

Q. What cases are those?

A. There are many such cases: Union Estates Company
351 against Adlon Construction Company, 221 New York 188 is such a case, and there are other cases where demand loans for more than five thousand dollars were made secured by collateral and the case of Hartley against Eagle Insurance Company, 222 New York, 178, is such a case in a way.

Q. So that in your opinion it is the law of the State of New York that the lender of money may charge more than six per cent per annum and may take a thing of greater value than the amount of the loan and six per cent per annum thereon without being tainted with usury?

Mr. Holliday: I object to the question as improper in form and argumentative, and not stating correctly the testimony of this witness, and not referring to the facts in issue in this case.

A. He may and he may not. Under the law of New York the rate of interest upon a loan of forbearance of money is six per cent for one year, and after that rate for a greater or less sum, or for a longer or shorter time, and all notes or loan agreements whereupon or whereby there shall be reserved or taken or secured to be reserved or taken any greater sum or greater value is usurious. But there are certain exceptions to that.

Q. Do you mean exceptions with respect to class of individuals or class of corporations?

A. No, exceptions in respect to such transactions as Defendant's Exhibit "B."

Q. All other transactions, however, would be usurious?

A. No, I do not say that.

Q. Well, Exhibit "B" could exact any article of however much value it might happen to be, or exact any amount of interest, and not be usurious?

A. No.

352 Q. Well, if Exhibit "B" were to take a thing of greater value than the amount of the loan mentioned therein, and six per cent per annum thereon, would it contravene the usury statutes of New York?

A. If Exhibit "B" called for a greater rate of interest than six per cent it would be usurious.

Q. Well, assuming that the policy is of greater value than the loan and 6 per cent interest per annum would it then contravene the usury statutes of New York and interest statutes of New York?

Mr. Holliday: I object to that question as based upon an assumption of facts not in issue in this case and irrelevant.

A. No.

Q. Well, is it because it is Exhibit "B" or for what reason?

Mr. Holliday: Objected to as an improper question.

A. The policy is not Exhibit "B," the loan agreement is Exhibit "B."

Q. I say, is it because it is a loan agreement, or what is the reason that in this particular sort of transaction it would not conflict with the statutes, but in all others it would?

Mr. Holliday: I object to the question as improperly framed and based upon an assumed statement by the witness or by counsel which is not in the record.

A. I did not say anything of the kind. I said that if Exhibit "B" called for a greater rate of interest than 6 per cent, it would be usurious.

Q. Well, supposing it called for the cancellation of a thing of greater value than the loan and interest at the rate of 6 per cent per annum, would or would not that, in your opinion, violate the 53 interest statutes of New York?

Mr. Holliday: I object to the question upon the ground that it is based on an assumption of facts not in the case at bar.

A. No.

Q. Although the policy might have a greater value than the loan and 6 per cent interest per annum, yet you say it would not be repugnant to the usury and interest statutes of New York?

A. I do say so.

Q. And do you know of any other agreements of the same sort outside of an insurance company that would not be repugnant to or violative of the interest or usury statutes of the State of New York.

Mr. Holliday: I object to that as not proper cross-examination, and irrelevant and immaterial.

A. I do not think any agreement for the foreclosure of collateral that at the time the agreement was made fixed a price that should be paid for the collateral in the event of a default in the payment of the principal or interest on the loan, would be usurious or come within the statute on usury, the parties themselves having agreed on the price, even although some person else might think that the collateral was worth more than the party who owned it and the party who was dealing with him had agreed should be paid for it.

Q. So that in your opinion the agreement of the parties fixed the price and the courts have no power to go beyond that agreement—look beyond it?

Mr. Holliday: I object to the question as improper in form, and argumentative and calling for a conclusion.

354 A. If the parties are sui juris they have a perfect right to fix the price of the thing they are dealing with, and the courts cannot and will not go behind what they have done unless there is some extraordinary reason for it.

Q. In other words, the usury statutes of the State of New York are a scrap of paper?

Mr. Holliday: I object to the question as improper in form and utterly beyond the province of proper cross-examination.

A. No, the usury statutes of New York are laws that have been in force for many, many years, are generally observed by the citizenship of New York, and are enforced by the courts of New York in accordance with the terms of those laws.

Mr. O'Donohoe: That is all.

Redirect examination.

By Mr. Holliday:

Q. Mr. McIntosh, I will ask you whether or not in your answers concerning the validity of this loan agreement, Defendant's Exhibit "B", and the pledge of the policy thereunder, particularly as regards the usury laws of the State of New York, you have had in mind the fact that the policy in this case recited that its surrender value at the end of the fourth year of the policy life, should be $191 for each one thousand dollars, and that therefore the total surrender value, according to the terms of the policy itself as issued, was the sum of $9,550?

A. I do not know that I had that particularly in mind in making my answers. I knew, of course, that the indebtedness for which the pledge was foreclosed equaled the surrender value of the policy, and I know what the surrender value of policies is in the business. I know that as an insurance man, perhaps, rather than as a lawyer.

355

Q. Would the fact that the surrender value of the policy at the end of the fourth year was expressly stated in the policy, modify or change the answers you have given?

A. No, not at all; the surrender value of the policy I understand to be the price the parties agreed the company should pay if there should be a foreclosure of the pledge. I have had that in mind all the time.

JAMES H. McINTOSH.

Subscribed and sworn to before me, this 28th day of April, 1919.

[SEAL.] ROBERT GUNN,
Notary Public, New York County, No. 251.

STATE OF NEW YORK,
County of New York, ss:

I, Robert Gunn, a notary public within and for the County of New York, in the State of New York, do certify, that in pursuance of the within stipulation and agreement, came before me, at No. 55 Cedar street, in the City, County and State of New York, James H. McIntosh, who was by me sworn to testify the whole truth of his knowledge touching the matter in controversy aforesaid; that he was examined and his examination reduced to typewriting by me, and subscribed by him in my presence, and his said deposition is now herewith returned.

I further certify that said deposition was taken at the
356 address aforesaid on the 24th day of April, 1919, and was signed by said witness on the ..... day of April, 1919.

I further certify that said James H. McIntosh is a resident of said County of New York in said State of New York.

Given at the City of New York, in the County of New York and State of New York, this 28th day of April, 1919.

[SEAL.]

ROBERT GUNN,
Notary Public, New York County, No. 251.

Mr. Holliday: I now offer in evidence Section 21 of Chapter 272 of the Laws of New York of 1896, relating to the powers of married women, being the section pleaded in the answer on file in this case.

Mr. O'Donohoe: We make the same fifteen objections, your Honor.

The Court: Same ruling.

Which objection was, by the Court, sustained; to which action and ruling of the Court, defendant, by its counsel, then and there duly objected and excepted, and still objects and excepts.

Mr. Holliday: I assume it is not necessary for me to read the statute into the record here?

The Court: No.

"New York Laws of 1896, Chapter 272, Section 21—Powers of Married Woman.—A married woman has all the rights in respect to property, real or personal, and the acquisition, use, enjoyment and disposition thereof, and to make contracts in respect thereto with any person, including her husband, and to carry on any business,
trade or occupation, and to exercise all powers, and enjoy all
357 rights in respect thereto, and in respect to her contracts, and be liable on such contracts as if she were unmarried; but a husband and wife cannot contract to alter or dissolve the marriage or to relieve the husband from his liability to support his wife."

Mr. Holliday: I next offer in evidence, your Honor, Section 16 of Chapter 218, New York Laws, 1897, relating to insurance companies,

being the section of the statute pleaded in our answer on file in thi case.

Mr. O'Donohoe: We make the same objection, your Honor; and in addition to that, the section would be immaterial, because it doe not give any power to the defendant to appropriate the money o cancel the policy.

The Court: Same ruling.

Which objection was, by the Court, sustained; to which action and ruling of the Court, defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

Mr. Holliday: Exception; and I understand that it is saved a completely as though I read the section of the statute into the record?

"New York Laws of 1897, Chapter 218, Section 16.—The cash capital of every domestic insurance corporation required to have a capital, to the extent of the minimum capital required by law, shall be invested and kept invested in the kinds of securities in which deposits with the superintendent of insurance are required to be made. The residue of the capital and the surplus money and
358 funds of every domestic insurance corporation over and above its capital, and the deposit that it may be required to make with the superintendent may be invested or loaned on the pledge of any of the securities in which deposits are required to be invested, or in the public stocks or bonds of any one of the United States, or except, as herein provided, in the stocks, bonds and other evidences of indebtedness of any solvent corporation incorporated under the laws of the United States, or of any State thereof, or in such real estate of the United States, or of any State thereof, or in such real estate as it is authorized by this chapter to hold; but no such funds shall be invested in or loaned on its stock or the stock of any other insurance corporation carrying on the same kind of insurance business. Any domestic insurance, corporation may, by direction and consent of two-thirds of its Board of Directors, managers or finance committee, invest, by loan or otherwise, any such surplus money or funds in the bonds issued by any city, county, town, village or school district of this State, pursuant to any law of this State. Any corporation organized under the ninth subdivision of Section 70 of the Insurance Law for guaranteeing the validity and legality of bonds issued by any State or by any city, county, town, village, school district, municipality or other civil division of any State, may invest, by loan or otherwise, any such surplus money or funds in the bonds which they are authorized to guarantee every such domestic corporation doing business in other States of the United States, or in foreign countries, may invest the funds required to meet its obligations incurred in such other States or foreign countries, and in conformity to the laws thereof, in the same kind of securities in such other States or foreign countries that such cor-
359 poration is by law allowed to invest in, in this State. Any life insurance company may lend a sum not exceeding the

lawful reserve which it holds upon any policy, on the pledge to it of such policy, and its accumulations as collateral security. But nothing in this section shall be held to authorize one insurance corporation to obtain, by purchase or otherwise, the control of any other insurance corporation."

Mr. Holliday: I next offer in evidence, your Honor, the case of Palmer against Mutual Life Insurance Company of New York, 77 New York Supplement, page 869.

Mr. O'Donohoe: I make the same objections to that, your Honor; and we make an additional objection that the case is not pleaded in defendant's answer.

The Court: Same ruling.

Which objection was, by the Court, sustained; to which action and ruling of the Court, defendant, by its counsel, then and there duly objected and excepted, and still objects and excepts.

Mr. Holliday: This case being the one referred to in the depositions of Mr. McCulloh and Mr. McIntosh.

Mr. Holliday: I next offer in evidence the case of Clare against Mutual Life Insurance Company, volume 201, New York, at page 492, being the case referred to in the deposition of Mr. McCulloh and of Mr. McIntosh.

Mr. O'Donohoe: Same objections; including the objection
360 that that case was not pleaded in the defendant's answer or referred to there in any way.

The Court: Same Ruling.

Which objection was by the Court sustained; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

Mr. Holliday: I next offer in evidence the decision in the case of Hays against New York Life, 124 New York Supplement, page 792, being the case referred to in the second deposition of Mr. James H. McIntosh.

Mr. O'Donohoe: We make the same objections, including the one that that case is not pleaded by the defendant in any way.

The Court: Same ruling.

Which objection was by the Court sustained; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

Mr. Holliday: I next offer in evidence the case of Dannhauser against Wallenstein, 169 New York, 199; case of Anderson against Goldsmith, 103 New York, 617; Hartley against Eagle Insurance Company, 222 Federal 178; and the case of Union Estates Company against Adlon Construction Company, 221 Federal 183; being all cases referred to in the second deposition of Mr. McIntosh.

Mr. O'Donohoe: We object to those cases on the same grounds,

included among which is the objection that none of those
361 cases have been pleaded in the defendant's answer.
The Court: Same ruling.

Which objection was by the Court sustained; to which action and ruling of the Court defendant, by its counsel, then and there duly objected and excepted and still objects and excepts.

Mr. Holliday: Of course, I don't suppose it is necessary for me to again repeat the position that I have taken in this case throughout, your Honor, but I feel obliged, in view of your Honor's rulings at this time to make a statement that the defendant contends that your Honor's rulings on this question of what law governed this contract, and the question of the admissibility of the New York law is directly contrary to the opinion of the Supreme Court of Missouri and the mandate of that Court under which the case is sent back here for retrial: I don't know whether it is necessary for me to read into the record that mandate it being part of the record of the case; nevertheless, I will at this time offer it.

The Court: You may refer to it by reference to the Southwestern.

Mr. Halliday: Well, I am referring, of course, now to the mandate, which includes a copy of the opinion, the mandate of the Supreme Court of Missouri, which came down this last time.

The Court: It may be read.

Said mandate (omitting caption) is in words and figures as follows:

362 *Mandate.*

Opinion.

I.

This is the second appeal in this case. On the former appeal the question presented was the propriety of an adverse instruction, under the constraint of which plaintiff took a nonsuit with leave to move to set it aside. The evidence in the case and the points then in judgment are set out in 269 Mo. 509.

Upon the remand of the former appeal the pleadings were reformed, and submitted, among other issues, the applicability of the statutes of Missouri to a loan agreement made by the assured with defendant, secured by a pledge of the policy in suit.

The loan agreement, of date October 12, 1904, was to the effect that the Mutual Life Insurance Company of New York lent to Frederick W. V. and Mary S. Blees the sum of $9,550. From this amount the company deducted the sum of $4,291.50 as premium to September 29,, 1905, and $468.00 as interest thereon. This agreement also contained the following:

"The receipt of the foregoing amount as a loan is hereby acknowledged upon the pledge as hereinafter set forth in policy No. 1,207,072 in said company. And the said parties of the second part

agree to repay the said sum of $9,550 to the company at its head office, Nassau, Cedar and Liberty streets, in the City of New York, on the 29th day of September, 1905.

"In consideration of the amount of said loan the parties
363 of the second part hereby assign, transfer and set over all of their right, title and interest in and to said policy No. 1,207,072 issued by said company on the life of Frederick W. V. Blees, together with any and all moneys which may be or become payable under the same, to the company as collateral security for the payment of said loan with interest, the said parties of the second part will forever warrant and defend the title of the said company to the said policy.

"In the event of default in the payment of said loan on the date hereinabove mentioned, the company is hereby authorized at its option, without notice and without demand for payment, to cancel said policy, and apply the customary cash surrender consideration then allowed by the company for the surrender for cancellation of similar policies, namely, $9,550 to the payment of said loan with interest, the balance, if any, to be payable to the parties entitled thereto on demand, or the company may at its own option renew said loan for one year or less period on the written request of any one of the parties of the second part hereto and without any further notice to any one of the parties of the second part."

The policy pledged for this loan agreement was issued on September 29, 1901. When the above loan agreement was sent to the home office of the defendant in New York and accepted, and after the deductions as therein provided for, a check for the remainder, drawn upon the American Exchange Bank of New York, was forwarded to the assured and subsequently paid. No further premiums were ever paid on the policy nor was the loan paid at its maturity, to wit, September 29, 1905.

364 Thereafter, on November 15, 1905, the defendant exercised the right under the loan contract to foreclose the pledge of the policy and applied the full cash surrender value to the extinguishment of the loan and cancellation of the indebtedness and the policy.

Frederick W. V. Blees, the assured, before his death on September 8, 1906, and before making the loan, assigned the policy in question to his wife, who jointly with him executed the loan agreement. About six years after the death of her husband, the wife, who had remarried, brought the present action. On the trial the court gave an peremptory instruction to find for plaintiff, resulting in a judgment for $92,069.28. Defendant duly appealed.

II.

The decisive question now presented relates to the action of the trial court in excluding all evidence as to the laws of New York. Defendant pleaded that the loan agreement and pledge of the policy was a contract made in New York and governed by its laws, which

were also pleaded in defendant's answer on the last trial. The trial judge took the view that this contract and pledge were covenants subsidiary to the policy and not independent and, therefore, as much under the restrictions of the applicatory statutes of this state (R. S. 1909, sec. 6946), as the policy itself. That view was in accord with the former decisions of this state (Head v. Ins. Co., 241 Mo. 403 et cases cited).

The former of these cases has been reviewed by the Supreme Court of the United States (N. Y. Life Ins. Co. v. Head, 234 U. S.
365 148), but that court did not deem it necessary to the conclusion there expressed, to rule upon the relation of a loan agreement to the contract contained in the policy, i. e., whether subsidiary or independent—since its view, that the loan agreement before it was not subject to the terms of the forfeiting statute of Missouri (R. S. 1909, sec. 6946), was based upon the postulate that the State of Missouri could not control "all subsequent agreements" by the parties to a policy of insurance taken out in that state, if entered into "in other jurisdictions by persons not citizens of Missouri and lawful when made" (N. Y. Life Ins. Co. v. Head, supra, l. c. 165). To the extent that the loan contract (whether subsidiary or independent as to a policy) in the Head case was not subjected to the non-forfeiting statute (R. S. 1909, sec. 6946) governing the policy, the previous rulings of this court were disapproved.

While the parties to the loan agreement in the Head case were non-residents of Missouri, that fact was not a determining one in the decision of the Supreme Court of the United States; for in the subsequent decision of N. Y. Life Ins. Co. v. Dodge (decided April 1, 1918, Sup. Ct. Rep. May 1, 1918, p. 337) it distinctly appeared that the assured Dodge and his wife, the beneficiary, were at all times citizens and residents of Missouri, and that they borrowed money on a pledge of the policy, sending it and the loan contract to New York for acceptance according to the agreement signed by them in Missouri. In disposing of the issue arising on that state of facts, it was said:

366 "That the policy when issued to Dodge became a Missouri contract, subject to its statutes, so far as valid and applicable, is undisputed and clear. The controlling doctrine in that regard was announced and applied in Equitable Life Ins. Co. v. Clements, 140 U. S. 226; N. Y. Life Ins. Co. v. Cravens, 178 U. S. 389 and Northwestern Life Ins. Co. v. Riggs, 203 U. S. 243. In each of these cases the controversy related to the interpretation and effect of the original policy—not a later good faith agreement between the parties. We held that to the extent there stated the state had power to control insurance contracts made within its borders. With those conclusions we are now entirely content; but they do not rule the question presently presented. Here the controversy concerns the effect of the state statute upon agreements between the parties made long after date of the policy and action taken thereunder; their essential fairness and accordance with New York laws are not challenged.

"Considering the circumstances recited above, we think competent parties consummated the loan contract now relied upon in New York

where it was to be performed. And, moreover, that it is one of a kind which ordinarily no state by direct action may prohibit a citizen within her borders from making outside of them. It should be noted that the clause in the policy providing 'cash loans can be obtained by the insured on the sole security of this policy on demand, etc.,' certainly imposed no obligation upon the company to make such a loan if the Missouri statute applied and inhibited valid hypothecation of the reserve as security therefor as defendant in error maintains. She cannot, therefore, claim anything upon the theory that the loan contract actually consummated was one which
367 the company had legally obligated itself to make upon demand."

The court then referred to its previous ruling in the Head case (234 U. S. 149) reciting the fact under which it held the loan contract in that case to be free from the control of the non-forfeiting statute of this state (R. S. 1899, sec. 7897, R. S. 1909, sec. 6946), although the policy itself was a Missouri contract, and concluded the discussion, viz:

"Under the laws of New York where the parties made the loan agreement now before us, it was valid; also it was one which the Missouri Legislature could not destroy or prevent a citizen within its borders from making beyond them by direct inhibition; and applying the principles accepted and enforced in Insurance Company v. Head, we think the necessary conclusion is that such a contract could not be indirectly brought into subjection to statutes of the state and rendered ineffective through a license authorizing the insurance company there to do business. As construed and applied by the Springfield Court of Appeals, section 7897 (R. S. Mo. 1899) transcends the power of the State. To hold otherwise would permit destruction of the right—often of great value—freely to borrow money upon a policy from the issuing company at its home office and would, moreover, sanction the impairment of that liberty of contract guaranteed to all by the Fourteenth Amendment."

Although meeting with a sharp dissent, the foregoing ruling is paramount and imperative on this Court in all cases like the present, subject to review by the Supreme Court of the United States.

368 III.

The question, therefore, to be ruled is whether the loan agreement and pledge of the policy in the instant case are governed by the laws of New York. This is determinable by the principles of law governing the making, the validity, the interpretation and the enforceability of contracts made under circumstances such as are shown in the record.

Absent any contrary intention, the validity, obligation and interpretation of a contract relating to personal property, are governed by the law of the place where it is made. It is generally true that the place of performance governs matters connected therewith and that the remedy depends upon the law of the place where suit is brought

(2 Elliott, Contracts, sec. 1110, et seq.; Scudder v. Union Nat. Bank, 91 U. S. 406; Ruhe v. Buck, 24 Mo., l. c. 183 et seq.; Tremaine v. Dyott 161 Mo. App., l. c. 221). No contract can be consummated until the final act essential to its obligation is performed (2 Elliott, Contracts, sec. 1115; 5 R. C. L. p. 935, sec. 26 and cases cited under note 8). If, therefore, the act creating the obligation of a contract is performed at a particular place, the contract must be said to have been made at that place; for until the act done there the parties are not bound (1 Elliott, sec. 62). It is also true that "when it appears from the facts of the contract that there was to be a good faith performance thereof in some jurisdiction other than that of the lex loci contractus and that it is made with reference to the laws of some other place, then it is to be construed according to the law of the place with reference to
which is is made. When the terms or nature of the contract
369 show that it is to be executed in another country or state, then
the place of making the contract becomes so far immaterial and the law of the place where the contract is to be performed governs in determining the rights of the parties" (2 Elliott, Contracts, sec. 1119).

It is clear that "if the place where the contract is made is also the place where it is to be performed, there is ordinarily, no doubt as to the application of the rule, for then the lex loci contractus and the lex solutionis are the same" (5 R. C. L., p. 934, sec. 25 and cases cited under note 6). Applying the foregoing principles of law, as far as invoked by the facts in the present case, there can be no escape from the conclusion that the loan contract and pledge of the policy were both consummated and to be performed in the State of New York. It is evident that the loan contract did not become a binding obligation until it was delivered to the defendant (appellant) in the State of New York and assented to and accepted by it there. It is also apparent from the portion of the loan contract quoted above, that the promisors therein (plaintiff and her husband) agreed "to repay the said sum of $9,550 to the company at its head office, Nassau, Cedar and Liberty streets in the City of New York on September 29, 1905." Necessarily, therefore, the place of performance of the loan contract and the accompanying pledge of the property were fixed by the agreement itself in the State of New York. These facts made it a New York contract and performable in that state, just as fully as if the parties had recited in hæc verba that the laws of New York should govern an agreement entered into in that state and contracted to be performed
in that state. The recital of such an agreement is the only dif-
370 ference as to the loan agreements between the case at bar
and the recent decision of the Supreme Court of United States in N. Y. Life Ins. Co. v. Dodge, supra. But inasmuch as such a recital was not necessary in the present case, in view of the fact that the contract itself was not made until the defendant became a party to it in New York where it was also specifically agreed it should be performed, there is no point of essential distinction between the facts in judgment in this case and those presented in N. Y. Life Ins. Co. v. Dodge, supra.

It necessarily follows that conformity to the ruling in that case requires the judgment in the instant case to be reversed and the cause remanded for the error of the trial court in excluding proof of the New York laws.

On a new trial an opportunity will be afforded to determine the issue as to whether or not the defendant complied strictly with the terms of the loan agreement and conformed strictly to the laws of New York in the cancellation of the policy and the extinguishment of the loan indebtedness.

The judgment is reversed and the cause remanded. It is so ordered.

HENRY W. BOND,
C. J.

The foregoing opinion of Bond, J., in Division No. One is adopted as the opinion of the Court in Banc, Walker, Ferris and Williams, JJ., concur; Woodson, J., dissents.

STATE OF MISSOURI, *sct:*

I, J. D. Allen, Clerk of the Supreme Court of Missouri, do hereby certify that the foregoing is a true copy of the opinion of said
371 Court, delivered in the foregoing entitled cause, on the 27th day of November, 1918, as fully as the same appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Supreme Court. Done at office in the City of Jefferson, State aforesaid, this 28th day of December, 1918.

J. D. ALLEN,
Clerk,

[SEAL.]

By PATRICIA NACY,
D. C.

In the Supreme Court of Missouri, October Term, 1918.

MARY S. LIEBING, Respondent,

vs.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Appellant.

Appeal from the Circuit Court, City of St. Louis.

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of the City of St. Louis rendered, be reversed, annulled and for naught held and esteemed, and that the said appellant be restored to all things which it has lost by reason of the said judgment. It is further considered and adjudged by the Court that the said cause be remanded to the said Circuit Court of the City of St. Louis for further proceedings to be had therein, in conformity with the opin-
372 ion of this Court herein delivered; and that the said appellant recover against the said respondent its costs and charges herein expended, and have execution therefor. (Opinion filed.)

STATE OF MISSOURI, *sct:*

I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the October Term thereof, 1918, and on the 27th day of November, 1918, in the above entitled cause.

Given under my hand and seal of said Court at the City of Jefferson, this 28th day of December, 1918.

[SEAL.]

J. D. ALLEN,
Clerk,
By PATRICIA NACY,
D. C.

Mr. Holliday: And particularly to that portion of the language of the mandate, which reads as follows: "Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of the City of St. Louis rendered, be reversed, annulled and for naught held and esteemed, and that the said appellant be restored to all things which it has lost by reason of the said judgment. It is further considered and adjudged by the Court that the said cause be remanded to the said Circuit Court of the City of St. Louis for further proceedings to be had
373 therein, in conformity with the opinion of this Court herein delivered."

The Court: I want to say, in answer to the offer of the mandate, whilst I want to follow the higher court's decision, that the facts developed in this case are different from those set forth in the opinion rendered by the Supreme Court, from which this mandate is directed to this court, and reported in the 207th Southwestern, on page 230; particularly in view of the fact that the stipulation here shows a different set of facts from those set out in that opinion; furthermore, nothing was said in there about a waiver, and it leaves the case in conflict with other decisions of the Supreme Court with reference to pleading defenses; furthermore, we have the conflict here between this decision and the 239th Missouri, page 509; and in my opinion, the opinion of the 239th Missouri makes this case, the facts here *res adjudicata*, in that the Court made no finding in there, with reference to the question of the New York laws, which were not originally pleaded, but which have since been invoked in the case as a defense.

Mr. Holliday: Well, in that connection, permit me to call your Honor's attention to this, that at the first trial of this case the loan agreement was not in evidence; all that was heard was the plaintiff's case, and the case went off on nonsuit at the end of the plaintiff's case; the loan agreement and the affirmative defenses raised in the answer were not, strictly speaking, involved at all, and you will not find,

f my memory serves me right, any mention in the opinion, or any
assing on the loan agreement or the effect of it in Judge Blair's
pinion; in other words, that was not before him, because Judge
Hitchcock, trying the case, nonsuited the plaintiff at the close
374 of her case, and at that trial the loan agreement was not
even in evidence, so it is difficult for me to see how the de-
ision in the 269th could be res adjudicata on any facts connected
ith the loan agreement, since that was not in it.

The Court: The facts were stated in that case, in that opinion, with reference to the mentioning of the loan procedure.

Mr. O'Donohoe: If the Court please, the plaintiff on the first trial was not only nonsuited but her petition was dismissed, and the law presumes that in such a case on appeal the merits of the case are decided; furthermore——

The Court: I think the 153d Appeal covers that.

Mr. O'Donohoe: Yes, your Honor; on the first appeal we asked the Court to decide all questions, because we did not want any unsettled questions in the case; if we were not entitled to recover we wanted to know that on the first appeal, and we asked the Court to pass on every question, and the Court did, I believe, pass upon every question in the case at that time.

Mr. Holliday: Of course, your Honor, I am taken a little bit by surprise by your Honor's rulings, and I ask now, as a matter of courtesy, it being almost 5 o'clock, if your Honor will adjourn until tomorrow morning, in order to permit me to determine whether I shall proceed with any additional proof or any other motion in this matter.

The Court: I have no objection to that.

Mr. Holliday: As your Honor will see, this is a very involved case; it has been pending now for seven years, and it has been twice to the
Supreme Court, and when I prepared for this trial I am frank
375 to say that, I prepared for it, relying on the last decision of
the Supreme Court, which, in my opinion, left only the one issue to be tried in this case; that is, whether this loan agreement was valid under the laws of New York, and that that would be the only issue. Now, of course, by your Honor's ruling, in not following that decision, I have been somewhat surprised—I am free to admit it—and I would like to ask, as a favor, if your Honor could adjourn until tomorrow morning so as to give me time to determine what further course I will take in the case.

Mr. O'Donohoe: If the Court please, I don't think the gentleman has correctly interpreted the ruling of the Court; I think the Court is following the opinion; but, as the Court stated, the facts, as developed in this case, are quite different to those developed on the former trial.

The Court: I don't think I am bound by any previous ruling where the facts, in my opinion, differ from those of the previous trial.

Mr. O'Donohoe: And, in addition to that, the question of waiver of defenses was not touched by the Supreme Court, and we have made the point here distinctly; your Honor has passed upon it,

certainly in accordance with the settled rule of decision in Missouri, and I think I am safe in saying the settled rule of decision everywhere else.

The Court: I have no objection to going over to tomorrow morning.

Mr. Holliday: I will appreciate it, your Honor.

Thereupon, the Court duly and properly admonished the jury as to the proper conduct of its members while court should not be in session, and the court was then adjourned until 10 o'clock
376 a. m., May 14th, 1919; at which day and hour court was duly reconvened, and the jury being present as before, the following proceedings were had, to wit:

Mr. O'Donohoe: If the Court please, there is one witness I forgot to put on the stand, and Mr. Holliday has kindly agreed that he might go on now.

W. B. COWEN, being first duly sworn by the clerk to tell the truth, the whole truth, and nothing but the truth, testified on behalf of the plaintiff, as follows:

Direct examination.

By Mr. O'Donohoe:

Q. What is your name?
A. W. B. Cowen.
Q. What is your business?
A. Vice-president, National Bank of Commerce.
Q. How long have you been such?
A. About eleven or twelve years.
Q. I show you a check drawn on the American Exchange National Bank of New York, marked "Defendant's Exhibit C," and ask you whether or not that check was deposited in your bank?
A. Yes.
Q. Was it deposited as a credit account or for collection?

Mr. Holliday: Now, just a moment; I object to that; that is a matter of book entry; I don't believe this witness can testify to that.

Mr. O'Donohoe: Well, if he knows; we have shown the books to be destroyed, your Honor.

The Court: I understand that the check was, that the Clearing House stamp was shown there, which would indicate it was put through for collection; now, if he knows whether it was deposited.
377 The Witness: According to this I can tell.

Mr. O'Donohoe:

Q. What is your answer, Mr. Cowen?
A. This was deposited.
Q. Now, if it were deposited for collection, would there be any number on it?

A. Yes, there would.
Q. And there is not a number on it?
A. No, sir.
Q. It was treated as a cash transaction between the depositor and the bank?
A. Yes, sir.

Mr. O'Donohoe: That's all.

Cross-examination.

By Mr. Holliday:

Q. Where was this check finally paid, Mr. Cowen?
A. I suppose in New York.
Q. I ask you to examine it.
A. It was finally paid in New York.
Q. Now, you say it was deposited in your bank—if the New York bank had refused payment of that check when it came there, what would have happened?
A. It would have been protested and returned.

Mr. O'Donohoe: We object, your Honor, please——
The Court: He said they would have protested it.
Mr. O'Donohoe: Not any evidence it came back.

Mr. Holliday:

Q. If the New York bank refused to pay that check when it reached New York; that is, the American Exchange Bank, on which it was drawn, had refused to pay it, what would have happened to the account of the person who deposited that check with you?
A. Well, we would have been notified from New York that the check went to protest, and we would charge it back immediately.
Q. You would charge it back to that person's account?
A. Immediately.
Q. Immediately?

378 The Court:

Q. Like all person's checks?
A. Yes.

Mr. Holliday: That's all.
Mr. O'Donohoe: That's all.

Thereupon the jury was excluded from the court-room, and the following proceedings were had, to wit:

Mr. Holliday: I requested your Honor to adjourn somewhat early yesterday afternoon so that we might go over to today in order that, as I stated, that I might have a short time in which to determine what course to pursue in view of your Honor's rulings excluding our evidence of the laws of New York, and your announcement that

you did not consider that the laws of New York were in issue in this case. I wish also to refer to your Honor's remarks about the statement of facts in Judge Bond's opinion. If I understood your Honor correctly you say that you thought Judge Bond had misstated the facts of the case.

The Court: He was misled evidently in making this statement of facts; whether it was through oversight or mistake, I don't know.

Mr. Holliday: The only statement of fact to which your Honor has referred as being misleading, or erroneous, is the statement in Judge Bond's opinion, when the above loan agreement was sent to the home office of the defendant in New York and accepted, and after the deductions as therein provided for, a check for the remainder drawn upon the American Exchange Bank of New York was forwarded to the assured, and subsequently paid. Now, as I stated to your Honor yesterday, in argument on this point, I do not consider that Judge Bond's opinion states, or that the necessary construction of it is that it is meant to convey the idea that the check was sent direct to Blees and his wife. As a matter of fact, as I stated
379 also yesterday, that point was brought up in argument not only before Division Number One, but again before court in banc. The question arose as to whether Mr. Mercer stated in his deposition, which has now been read in evidence in this case, that the check and the premium receipt were sent to Mr. and Mrs. Blees, was meant to convey the idea they were sent direct. The attention of the Court was called in that argument to Mrs. Liebing's testimony, that it was Mr. Payson, the soliciting agent at Macon, Missouri, who had delivered the check to her husband and self, and that point was very carefully considered by the Court. As I stated, the various members of the court participated, by questions and by statements of their views in the oral argument, and finally the discussion went on the assumption that Mrs. Liebing's statement was correct, and that the check came to St. Louis and went up to Macon. The point was also made in oral argument that the application or loan agreement offered in evidence came through St. Louis and went to New York and that was urged as a point different from the Dodge case, but as I pointed out to your Honor, and as appears from the decision in the Dodge case, exactly the same thing happened there, and that is shown by the stamps which appear from the exhibits which are made part of the opinion of the Supreme Court of the United States in the Dodge case.

The Court: You mean those with reference to the clearing house?

Mr. Holliday: Yes.

The Court: It is quite apparent that the insurance com-
380 pany in that case had in mind something similar, same condition, because they were very careful to have Dodge write all letters directed to the New York office. Now, regardless of whether they were sent through the agent, or through their local offices, nevertheless they had him correspond direct with the home office. You will notice that. It makes considerable of a difference whether he bound himself to be governed by the New York law or not.

Mr. Holliday: As I stated yesterday, those points were argued in

extenso, had been fuly briefed, and were argued in extenso before Division No. 1 and again before Court in banc. They certainly must have been in the minds of the Court, and each member of the Court concurred in this opinion.

The Court: Now, right there; you have two of the members of Division No. 1 were present in banc and one of them dissents; the only one who seems to agree to this state of facts is Judge Bond, who wrote the opinion. Now, I don't know what was in his mind when he wrote that, but nevertheless, as I read English, it is very clear to me that it reads, it is good English and I will say strikes me, if I had this explanation to make. The check on the Exchange Bank of New York was forwarded to the insured, that it was forwarded direct to the insured; I couldn't read it any other way than to say it was not transmitted to the local office or any other agency, but it was mailed to the insured, and in the Dodge case——

Mr. Holliday: Even if your Honor's construction were correct, and that was the application to be put on Judge Bond's language, and on his opinion, the statement was made by Judge Bond
381 during oral argument that in his opinion it made no difference whether the check went direct to the assured or went down to St. Louis and from there to the insured, so——

The Court: That would have saved a great deal of trouble if the Judge had just written that in his opinion. I don't know what side remarks were made. I had an incident of that kind in the Court of Appeals at one time, where the Court made a remark of that kind, and when it was taken up he said, well, he had changed his opinion since.

Mr. Holliday: I think if your Honor will refer to the reasoning of Judge Bond's opinion he will see why he does not consider the question of where the check went of any importance. His reasoning in his opinion, under title three, is as follows: "It is clear that if the place where the contract is made is also the place where it is to be performed, there is ordinarily no doubt as to the application of the rule, for then the lex loci contractus, and the locus solutionis are the same. Applying the foregoing principles of law, as far as invoked by the facts in the present case, there can be no escape from the conclusion that the loan contract and pledge of the policy were both consummated and to be performed in the State of New York. It is evident that the loan contract did not become a binding obligation until it was delivered to the defendant, in the State of New York, and assented to, and accepted by it there. It is also apparent from the portion of the loan contract quoted above that the promisors therein, the plaintiff and her husband, agreed to repay the said sum of $9,550 to the company at its head office, Nassau, Cedar and Lib-
erty streets, in the City of New York, on September 29th,
382 1905. Necessarily, therefore, the place of performance of the loan contract, and the accompanying pledge of the policy, were fixed by the agreement itself in the State of New York. These facts made it a New York contract, and performable in that State, just as fully as if the parties had recited in haec verba that the laws of New York should govern an agreement entered into in that State

and contracted to be performed in that State. The recital of such an agreement is the only difference as to the loan agreements, between the case at bar and the recent decision of the Supr-me Court of the United States in the New York Life Insurance Company against Dodge, supra, but inasmuch as such recital is not necessary in the present case, in view of the fact that the contract itself was not made until the defendant became a party to it in New York, where it was also specifically agreed it should be performed, there is no point of essential distinction between the facts in judgment in this case and those presented in New York Life Insurance Company against Dodge, supra." Now, it seems to me clear, beyond argument, from that statement of Judge Bond, that he, in reaching the conclusion that he did, laid no stress on where, how the check came to Mr. and Mrs. Blees, or whether it was sent direct, or whether it was sent through St. Louis or not; his reasoning is that the contract did not become effective until it was accepted, and it was accepted in New York, and, furthermore, that it showed, on its face, that it was payable in New York, and to be performed there, and, for those reasons, the New York law governed that contract.

The Court: An application for insurance—let's take that, for instance: An application for insurance is not accepted until
383 the policy is issued by the New York office; in that event, then, you could simply say that that was a New York contract, the policy was issued under a New York contract just the same as you contend in this instance. As far as that is concerned, the main office is in New York.

Mr. Holliday: I beg to differ with your Honor there, the law relating to insurance policies is that the place where the policy is delivered to the insured governs.

The Court: Well, we have here a place where the application was signed and all papers signed for loan, and the check delivered in Missouri.

Mr. Holliday: Yes, but in the case of a policy, the policy itself is the contract, and the Courts have held, for the reasons set out in many opinions—and usually because the policy provides it is not effective unless it is delivered, unless and until delivered—that the policy is governed by the laws of the State in which it is delivered, and that is an entirely different situation from that which we are facing here in regard to this loan agreement.

The Court: According to this stipulation in evidence, the facts are somewhat different; now, when the case was originally tried, it was sent back for the purpose of having it tried in accordance with the pleadings. At that time it came back, but was not tried in accordance with, that is, I assume that the Court did endeavor to follow that decision, but, nevertheless, there were different affirmative defenses pleaded. The Supreme Court, in the recent decision, has not passed upon that question at all, although here recently they have held just to the contrary. Now, I don't know whether we are on
384 our head or on our feet half the time. It does seem to me the Court ought to clarify the situation in some way, by passing upon these points, and we would know what we are doing. If

they would just simply go out and say that that is no longer the law of the State, it would be a different situation. They will eventually have to pass upon that.

Mr. Holliday: The question of our right to invoke the laws of New York was also very fully briefed by Mr. O'Donohoe.

The Court: I appreciate that fact, but not a single word is said about it in the opinion; that is the thing that gets me; that was fully briefed and no mention made of it at all by the higher court. Now, I don't know whether they intend to take a more recent decision, that Bankers' Life case, where they maintain the law in one case and in another ignore it; I don't really know where I am as regards the pleadings.

Mr. Holliday: In that connection, permit me to call your Honor's attention to these facts which appear in the record after the case came back on the first appeal. Mr. O'Donohoe filed a first amended petition, and then a second amended petition, and we then filed an answer to his second amended petition, which is the answer which is still on file today, and he then filed a reply to that answer and joined issue with our answer, and that was evidently in the mind of the Court when this opinion was written, and the reason why they held that the question of New York laws was properly in this case, because in the very second paragraph of Judge Bond's opinion the following language occurs: Upon the remand of the former appeal the pleadings were reformed and submitted among other issues the applicability of the statutes of Missouri to
385 the loan agreement made by the assured with the defendant, secured by a pledge of the policy in suit. Now, there is Judge Bond's language.

Mr. O'Donohoe: If I may interrupt, your Honor, we plead a waiver in that reply and stood upon the waiver in our reply, and took the position that those defenses founded upon the New York law had been waived.

The Court: I understand that that condition prevailed throughout after the filing of the amended answer and that that was not waived anywhere throughout the pleadings, or at the trial, in the second trial of the case.

Mr. O'Donohoe: Judge Bond, in the opinion, made an inadvertent statement that those laws were in the case from the beginning, although the answers are here, the answers were in the record, and there is not one word about the New York laws in any of those answers, and we tried this case out on the theory that it was a Missouri contract. The defendant invoked five affirmative defenses, which were based——

The Court: I recall that.

Mr. O'Donohoe (continuing): —upon the Missouri laws, and we tried the issues out under the Missouri laws, and then after the case came down for retrial, for the purpose of evading the mandate of the Supreme Court, defendant interposes a defense founded upon the New York laws. Now, if there is any case sanctioning the bringing in of a new defense after the case comes down for retrial o

sanctioning the change of cause of action, or change of defense, we have not been able to find it.

Mr. Holliday: Mr. O'Donohoe, will you point out where-
386 abouts in Judge Bond's opinion he says the laws of New York have been in this case since the——

The Court: That is just the thing; I don't see anything in that connection; that is why I say that has not been passed upon; I have looked into the pleadings; I want to be fair in this case; I am not being swayed by anything for one minute; I just want to follow the law, and I don't see, evidently that is a mistake in the opinion; there has been no waiver as far as I can see, regardless of what the opinion may say about the pleadings being offered on that basis, after making due reference to the pleading of waiver. I think the opinion should state those facts as they exist, that there was a plea of waiver, so that all the facts would be in the opinion. That is my opinion.

Mr. O'Donohoe: Now, of course, Judge Bond didn't use the language which I did.

The Court: I understand.

Mr. O'Donohoe (continuing): This case, the language he used is: "Defendant pleaded that the loan agreement and pledge of the policy was a contract made in New York and governed by its laws, which were also pleaded in defendant's answer on the last trial." Now, I took that to mean that Judge Bond thought that the New York law was in the answer on the first trial of the case.

Mr. Holliday: Well, of course, I am making this argument because necessarily we must take the position here that the decision of the Supreme Court of Missouri in banc, rendered in this case, should be the law of this case on this trial, and——

The Court: There is no question about that, that the Supreme Court decision should govern, but where all the facts as pre-
387 sented here in the case are not covered in the opinion of the Supreme Court, then I think I have a right to try the case according to law; that's all I am trying to do; I am not properly directed from anything I can see in that opinion, with the exception of one point.

Mr. Holliday: I have tried to point out to your Honor, according to the plain language of the opinion, the essential facts on which it is based, that is on which the conclusion is based, that the loan agreement was a New York contract, governed by the laws of New York, is unchanged by the case as it is today; the testimony is still in the case, the loan agreement is certainly unchanged, showing on its face that it is to be payable in New York; the testimony that it was forwarded to New York and accepted there on October 12th, 1904, is the same; whether it went through St. Louis on its way to New York, or whether the check for the loan went through St. Louis on its way to Macon, were not features considered or mentioned in the opinion of the Supreme Court, and we believe that the essential facts on which that opinion is based are in this trial.

The Court: I believe the Supreme Court has overlooked a feature in this case; that is, the pleading, the question of waiver; that I

think was overlooked entirely, and that I am confronted with as one of the principal features in the case.

Mr. Holliday: Of course, to make my formal statement of our position we must hold that your Honor refusing to follow this decision of the Supreme Court of Missouri, deprives us of our statutory and constitutional rights, and, of course, as I have pre-
388 served our position throughout, we also maintain that to deny to refuse to admit the laws of New York in evidence, to deny us the benefit of those laws is to deprive us of our property without due process of law, to deprive us of our liberty of contract, all in violation of Section 1, Article XIV of the Constitution of the United States; and, furthermore, to deny full faith and credit to the judicial acts and statutes of the proceedings of the State of New York, in violation of Section 1 of Article IV of the Constitution of the United States. Now, I understand that your Honor will still adhere to your ruling, and I will now request your Honor to stay or adjourn further proceedings in this case until I may apply to the Supreme Court of Missouri for a writ of prohibition, or other appropriate writ.

The Court: Do you know of any section of the statute, or of the laws in the State of Missouri, that will permit the Supreme Court to stop the trial of a case by reason of any method of trial adopted or ruling made by the Court?

Mr. Holliday: It is my understanding that it is the law——

The Court: These extraordinary remedies are applicable in certain instances, but you will have to show me where prohibition will lie in a case of this kind.

Mr. O'Donohoe: I can't see why your Honor should adjourn to afford the gentleman an opportunity of bringing writs; I think the plaintiff is entitled to a trial. If the gentleman has any cause of complaint he has his remedy by appeal. Judge Bond didn't mean that under all circumstances the laws of New York were ap-
389 plicable; he certainly didn't intend that; that if the facts would warrant the introduction of those laws in evidence, then they were to be received in evidence, but the facts do not warrant it. It is your Honor's duty, in my judgment, to follow the last ruling of the court in banc, the unanimous opinion stated in the Bankers' Life against Reynolds et al., where it is held——

The Court: That is just what I am trying to do, Mr. O'Donohoe.

Mr. O'Donohoe: I think that is the proper thing to do, your Honor, to follow the last ruling, unanimous ruling of the Supreme Court of Missouri.

Mr. Holliday: Your Honor has asked me to refer to what section of the statutes on which I base my request for this permission.

The Court: Yes.

Mr. Holliday: I refer to Section 2622 of the Revised Statutes of Missouri 1909, and I refer more particularly to the case, such as State ex rel. against Riley, 203 Missouri 175, and State ex rel. against Slover, 126 Missouri 652, to the effect that the writ of prohibition is available to keep the lower court within the scope of its power.

The Court: In a matter of this kind?

Mr. Holliday: Also State——

The Court: That writ of prohibition is all right enough where a judge has no authority to try a case, and you have got some grounds for it, but where a case has proceeded thus far, and that I had jurisdiction to try it, I don't see that any writ in the world will stop me from trying it. I will be frank enough to say that.

390 Mr. O'Donohoe: In other words, if the trial court has made an erroneous ruling on appeal the Supreme Court will correct it.

The Court: The proper way to get at it, but the writ of prohibition does not lie at this time, in my opinion, and I don't know of any law in the world that will make it applicable.

Mr. Holliday: There are some decisions which hold the court may be confined within the limits of its powers in a particular matter.

The Court: Certainly.

Mr. Holliday: As well as to prevent the excess of jurisdiction in a cause not given by law. State ex rel. against Fort, 210 Missouri 512.

The Court: If the writ of prohibition would prevail in this case we would have all the Judges up at Jefferson City about four times a day, because attorneys could find that the courts were erroneously trying cases all the way through; there wouldn't be a chance in the world of ever consummating a trial. I have often felt that way myself; I have had to take an appeal. I can't see—to prevent usurpation of judicial power—to show that I am trying to usurp any powers that do not belong to me; that is a different thing; I am only trying to adhere to the law; if there is any confusion I don't think I should stop in the middle of a trial and go up and ask our Supreme Court what I should do. I am going to try the case as I believe the law to be; render my decision accordingly, and then it is for the Supreme Court to undo that which I have done if I have done it erroneously; that is my opinion of the law.

391 Mr. Holliday: I understand, then, your Honor, that my request for a stay until I may present this matter to the Supreme Court is overruled?

The Court: Overruled.

To which action and ruling of the Court the defendant, by its counsel, then and there duly objected and excepted and still continues to object and except.

Mr. Holliday: Now, your Honor, I am compelled to do something which I regret very much indeed, but in view of your Honor's statement as to this case, and the decision of the Supreme Court of Missouri in this case, and as to the statement of facts by Judge Bond, and the issues passed on by him, although your Honor has had before you briefs showing what matters were briefed and argued in that case, compel me to submit an application for a change of venue.

The Court: Can you show me any law warranting a change of venue at this stage of the proceedings?

Mr. Holliday: I refer your Honor to Section 1927 of the Revised

Statutes of Missouri, 1909, and Section 1929 of the Revised Statutes of Missouri, 1909, more particularly to the latter section, which says when the application may be made.

The Court: In other words, your knowledge was not required until after the trial of the case, the issues of the case.

Mr. Holliday: Occurring in the trial of the case, your Honor.

The Court: That would create another bad situation, if an
392 attorney felt that a judge was not ruling properly, that he would have a right to take a change of venue, because the judge was prejudiced.

Mr. Holliday: Well, your Honor, I am in an embarrassing position in presenting——

The Court: I am just wondering whether you are sincere in making this proposition right now for change of venue.

Mr. Holliday: I am sincere, your Honor, but I am in an embarrassing position, because I don't wish to state——

The Court: It is perfectly proper to take advantage of any defense you may have, or any right under the law, but I don't believe that you have encountered any such proposition, to ask for change of venue after the case has been tried.

Mr. Holliday: Your Honor, this is the first time I have ever asked for a change of venue, and I regret it very much. I am not asking it because of erroneous rulings in the case. I stated briefly in my statement I was about to present with this application, I make this because it seems to me from your Honor's statements about the opinion, and statement of facts and opinion in this case, of the Court in banc of the State of Missouri, that your Honor is prejudiced on account of those statements.

The Court: I wish to say I have no feeling whatsoever in the case; I am only trying to follow the decision, but where the decisions are ambiguous, and where the facts warrant a differant decision on my part, I am going to follow the dictates of my conscience and the law as clearly as I can.

Mr. Holliday: Your Honor, I will present the formal application.

393 The Court: Yes, I see here, after a party has announced ready for trial and selected a jury, it is too late to move for a change of venue; that is the law of this State.

Mr. Holliday: (Presents typewritten application for a change of venue at the time.)

The Court: According to the laws of the State of Missouri, the application for change of venue will be denied.

To which action and ruling of the Court the defendant, by its counsel, then and there duly objected and excepted, and still continues to object and except.

Petition for Change of Venue.

Now comes the Mutual Life Insurance Company of New York, defendant in the above-entitled cause, and respectfully petitions the Court for a change of venue therein in accordance with Sections 1927

and 1929 of the Revised Statutes of Missouri 1909, for the following reasons:

First. That the Judge before whom said case is now on trial in the Circuit Court of the City of St. Louis is prejudiced.

Second. That the information and knowledge of the existence of a cause for a change of venue, as herein alleged, first came to the defendant during the trial of said cause, and on this day, and that this application for a change of venue is made as soon as the defendant acquired information and knowledge of an existence of a cause for a change of venue, as hereinbefore stated, and that such knowledge and information came to defendant since the adjournment of the last regular term of the Circuit Court of the City of St. Louis, and after filing its answer in said cause.

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MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
By FORDYCE, HOLLIDAY & WHITE,
Attorneys.

STATE OF MISSOURI,
City of St. Louis, ss:

John H. Holliday, of lawful age, being duly sworn, on his oath deposes and says that he is attorney and agent for the Mutual Life Insurance Company of New York, defendant in the above-entitled cause. That he has prepared and read the foregoing application and affidavit for a change of venue, and that the facts therein stated are true to the best of his knowledge and belief, and that he is duly authorized to make this application and affidavit on behalf of said corporation, and said John H. Holliday, on behalf of said corporation, petitions the Court that said Court grant to defendant a change of venue in the above-entitled cause, in accordance with Sections 1927 and 1929 of the Revised Statutes of Missouri, 1909, for the following reasons:

First. That the Judge before whom said cause is now on trial in the Circuit Court of the City of St Louis is prejudiced.

Second. That the information and knowledge of the existence of a cause for a change of venue, as herein alleged, first came to the affiant during the trial of said cause, and, on this day, and that this application for a change of venue is made as soon as the defendant acquired information and knowledge of the existence of a cause for a change of venue, as hereinbefore stated, and that such knowledge and information came to affiant since the adjournment of the last regular term of the Circuit Court of the City of St. Louis, and after the filing of the answer in the above-entitled cause.

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JOHN H. HOLLIDAY.

Subscribed and sworn to before me this 14th day of May, 1919.
My commission expires the 9th day of April, 1919.
[SEAL.] WALTER R. MAYNE,
Notary Public, City of St. Louis,
State of Missouri.

Div. 7.

No. 82584.

MARY S. LIEBING, Plaintiff,

vs.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant.

John S. Thompson, of lawful age, being duly sworn, on his oath deposes and says that he is an officer and agent of the defendant, Mutual Life Insurance Company of New York.

That he has been present at the proceedings in the above-entitled cause before the Circuit Court of the City of St. Louis, on May 12th and May 13th, 1919.

That he has read the foregoing application for a change of
396 venue, and that the facts therein stated are true to the best of his knowledge and belief.

JOHN S. THOMPSON.

Subscribed and sworn to before me this 14th day of May, 1919.
My commission expires the 9th day of April, 1919.
[SEAL.] WALTER R. MAYNE,
Notary Public, City of St. Louis,
State of Missouri

Mr. Holliday: Now, your Honor, I wish to make the point that the application for change of venue having been properly presented and ruled upon, that your Honor is without further jursidiction to try this cause.

The Court: When an application is timely presented, then I am without any jurisdiction; I don't know of any authority, where an application is made out of time, which would deprive me of jurisdiction of the case. If you have any authority I will consider it.

Mr. Holliday: The same authority, your Honor.

The Court: You show me an authority in the State of Missouri, where an application for a change of venue has been filed after the evidence has been introduced, stating that I have no further jurisdiction in the case, then I will just wash my hands of it mighty quick.

Mr. O'Donohoe: I think the filing, your Honor, of this affidavit for change of venue should show that it was filed after the close of the case.

The Court: No question about it; it is here in the record, at the close of the case; I understand it, Mr. Holliday.

397 Mr. Holliday: I don't believe that I will offer any further evidence now under these conditions.

The Court: Well, I understood last night that you did not have any further evidence.

Mr. Holliday: I cannot see what use it would be for me to continue to offer any evidence of the laws of New York or other documentary evidence relating to this case, under the theory that it is a New York contract, if they are to be excluded.

The Court: I understand that if you had been permitted to offer New York laws that would have closed your case; is that the idea?

The Court: The record will show that depositions were offered at this time.

Mr. Holliday: I except to that statement.

The Court: I mean that the application for change of venue will show——

Mr. Holliday: I also except to that entry in the record.

Mr. Holliday: I desire the record to show that a copy of the application for change of venue, which has been presented to the Court, and by the Court overruled, was duly served on counsel for the plaintiff, who was present in court with the plaintiff.

Mr. O'Donohoe: Just served on me now, your Honor.

The Court: The record may show it was served at the time the application was made, in court.

The Court: Call in the jury.

Thereupon the jury returned to the courtroom and took seats in the jury box.

The Court: Gentlemen, have you any further testimony to offer?

Mr. O'Donohoe: The plaintiff has no further testimony.

398 The Court: Has the defendant anything further?

Mr. Holliday: No.

Thereupon the Court took a recess until 11:19 o'clock a. m. of the same day, May 14, 1919, at which day and hour court was duly reconvened and the jury being present as before, the following proceedings were had, to wit:

Thereupon the defendant rested its case.

Thereupon the plaintiff rested her case.

And the foregoing was all the evidence offered and introduced at the said trial.

Demurrer to Evidence at Close of Whole Case.

Thereupon, at the close of the whole case, defendant, by its counsel, presented to the Court, in writing, and requested the Court to give and read to the jury, the following instruction in the nature of a demurrer to the evidence:

"The Court instructs the jury that under the pleadings and all of the evidence offered in this case, their verdict must be in favor of defendant."

Which instruction the Court refused to give and read to the jury; to which action and ruling of the Court, in refusing to give said instruction, defendant, by its counsel, then and there duly excepted, and still excepts.

399 *Plaintiff's Instruction Given.*

Thereupon, at the instance and request of plaintiff, the Court gave and read to the jury the following instruction, numbered 1:

1.

The Court instructs the jury to find for the plaintiff and allow her the sum of fifty-two thousand nine hundred and eleven dollars and forty-three cents, with interest thereon at the rate of 6 per cent per annum from the 20th day of November, 1906, to this date.

The Court further instructs the jury that if you find and believe from the evidence that prior to the filing of this suit, the defendant refused to pay the amount due under said policy; and if you further find and believe from all the facts and circumstances shown by the evidence that the defendant's refusal to pay the amount due under said policy to plaintiff was vexatious; that is, willfully and without reasonable cause, then you may allow her, in addition to the amount due under said policy and interest, a sum not exceeding 10 per cent of the amount due under said policy as damages, and a reasonable attorney's fee for such legal services, if any, as you may find and believe from the evidence has been rendered by the attorney for plaintiff in prosecuting this cause.

And you are further instructed to state separately in your verdict the amounts allowed, if any, and total the same and return your verdict for the aggregate of your findings.

400 To the giving of which instruction on behalf of plaintiff defendant, by its counsel, then and there duly excepted and still excepts.

Instructions Given of Court's Own Motion.

Of its own motion, the Court gave and read to the jury the following instructions, numbered 2 and 3:

2.

The jury are instructed that they are the sole judges of the credibility of the witnesses and of the weight to be given to their testimony. In determining such credibility and weight they will take into consideration the character of the witness, his manner on the stand, his or her interest, if any, in the result of the trial, his or her relation to or feeling towards the parties to the suit, the probability or improbability of his or her statements, as well as all the other facts and circumstances given in evidence.

3.

The Court instructs the jury that nine of your number have the power to find and return a verdict, and if less than the whole of your number, but as many as nine, agree upon a verdict, the same should be returned as the verdict of the jury, in which event all the jurors who concur in such verdict shall sign the same.

If, however, all of the jurors concur in a verdict, your foreman alone may sign it.

To the giving of which instructions of the Court's own mo-
401 tion, and each of them, defendant, by its counsel, then and there duly excepted and still excepts.

Defendant's Instructions Refused.

Defendant presented to the Court, in writing, and requested the Court to give and read to the jury the following instructions, marked A, B, C and D:

A.

The Court declares the law to be that even if the law of Missouri applied to the loan agreement and policy offered in evidence, defendant was entitled to deduct from three-fourths of the net reserve of said policy computed in accordance with Section 7897 of the Revised Statutes of Missouri, 1909, the entire indebtedness on said policy under the amendment to said section adopted in 1903, and therefore judgment must be for defendant.

B.

The Court declares the law to be that the decision of the Supreme Court of Missouri en banc rendered in this cause on the 27th day of November, 1918, constitutes the law of this case on this trial.

C.

The Court instructs the jury that as a matter of law the loan agreement and pledge of the policy thereunder in this case were accepted and entered into in the State of New York and the contract
402 was to be performed in the State of New York, and that therefore said loan agreement and pledge of the policy was a New York contract and governed by the laws of the State of New York.

D.

The Court instructs the jury as a matter of law that under the laws of New York a loan agreement made by an insured and the assignee of his policy with the insurance company issuing said policy, whereby the insured borrows from the insurance company a sum equal to the agreed surrender value of said policy at the date of the maturity of the loan, and agrees that in the event of default in the payment of said loan at maturity the insurance company may at its

option without notice and without demand for payment cancel said policy and apply the said surrender value to the payment of said loan with interest, is valid and legal, and the Court further instructs the jury that since it appears that the written loan agreement offered in evidence in the case at bar was an agreement of the character described in this instruction, and since it further appears from the said written loan agreement and from the policy offered in evidence that the agreed surrender value of said policy on September 29th, 1905, the date of the maturity of the loan, was $9,550, which sum exactly equalled the amount of the loan, and since it is admitted that the loan was not paid when due, the defendant was entitled to cancel said policy without notice and without demand for payment and to apply said cash surrender value to the payment of said loan, and your verdict must be in favor of defendant.

Which instructions, and each of them, the Court refused to give and read to the jury; to which action and ruling of the Court
403 in refusing to give and read said instructions to the jury, and each of them, defendant by its counsel then and there duly excepted and still excepts.

Under the instructions of the Court, on the 14th day of May, 1919, at the April Term, 1919, of said Court, the jury returned into court (caption omitted) the following verdict:

Verdict.

We, the jury, in the above-entitled cause do find the issues joined in favor of the plaintiff and against the defendant, and we assess plaintiff's damages at the sum of one hundred seven thousand five hundred forty-two and nine-one-hundredths dollars, as follows, to wit:

Amount due under policy	$52,911.43
Interest	39,630.66
Damages	5,000.00
Attorney's fees	10,000.00
Total	$107,542.09

(Signed) EMIL A. LUTZ,
Foreman.
H. A. GROTE.
J. RODDY.
J. H. G. COMPTON.
WM. F. PETERSON.
EDW. RATZ.
JOSEPH A. GOEPPERT.
EMIL GANTER.
HUGO V. COTTA.
B. C. SINE.
W. W. HANSEN.

404 *Defendant's Motion for New Trial.*

On the 16th day of May, 1919, during the same term of said Court, and within four days after the trial of said cause and the rendition of said verdict, defendant filed its motion for a new trial, which (caption omitted) is in words and figures as follows:

Defendant's Motion for New Trial.

Now, at this day, comes defendant and moves the Court to set aside the verdict and judgment heretofore rendered in the above-entitled cause, and to grant defendant a new trial therein, and for grounds for said motion states:

First. That the verdict of the jury is against the evidence and the weight of the evidence.

Second. That the Court erred in admitting incompetent, irrelevant and immaterial evidence offered by the plaintiff over the objection of the defendant.

Third. That the Court erred in excluding competent, relevant and material evidence offered by the defendant.

Fourth. That the Court erred in submitting to the jury the question of damages and attorneys' fees.

Fifth. That the Court erred in giving the peremptory instruction requested by the plaintiff.

Sixth. That the Court erred in directing a verdict for the plaintiff on the policy and thereby deprived the defendant of its right to a trial by jury, in violation of Section 28 of Article II of the Constitution of the State of Missouri, and deprived the defendant of its property without due process of law, in violation of Section 30
405 of Article II of the Constitution of the State of Missouri and of Article V and of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

Seventh. That the Court erred in the instructions given of its own motion.

Eighth. That the Court erred in refusing the instructions offered by the defendant.

Ninth. That the Court erred in refusing to declare that the decision of the Supreme Court of Missouri en banc heretofore rendered in this cause on the 27th day of November, 1918, constituted the law of this case, and in refusing to follow and abide by said decision of the Supreme Court of Missouri and the mandate of said Supreme Court issued thereunder.

Tenth. That the Court erred in refusing the instruction in the nature of a demurrer to the evidence offered by the defendant at the close of the plaintiff's case.

Eleventh. That the Court erred in refusing the instruction in the nature of a demurrer to the evidence offered by the defendant at the close of the entire case.

Twelfth. That the Court erred in refusing to admit in evidence the laws of the State of New York offered by the defendant, tending to prove that the loan agreement offered in evidence in the case was valid and legal under the laws of New York, and thereby denied to the defendant the benefit of said laws of the State of New York and refused to give full faith and credit to the public acts, records and judicial proceedings of the State of New York, in violation of Section 1 of Article IV of the Constitution of the United States, and denied the defendant the equal protection of the laws, and deprived
406 the defendant of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Thirteen-. The Court erred in refusing to declare that the plaintiff in this case was not entitled to recover under Section 7897 of the Revised Statutes of Missouri, 1899, and that said section, if construed so as to deprive the defendant of its rights under the loan agreement in evidence and of its rights to deduct any indebtedness on the policy from the reserve or surrender value of the policy, deprived the defendant of its liberty of contract and of its property without due process of law, in violation of Article V and of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

Fourteenth. The court erred in ruling that the defendant was not entitled to the benefit of the amendment to Section 7897 of the Revised Statutes of Missouri, 1899, made by Act of the Legislature of Missouri at its session in 1903, and found in the laws of 1903, at page 208, and thereby denied to the defendant the equal protection of the laws, and deprive the defendant of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and Section 30 of Article II of the Constitution of the State of Missouri.

Fifteenth. The Court erred in refusing to grant to the defendant an adjournment or stay of proceedings in order that the defendant might apply to the Supreme Court of Missouri for a writ of prohibition or other appropriate writ requiring the trial court to conform
407 to the opinion and mandate of the Supreme Court of Missouri en banc heretofore rendered in this case on the 27th day of November, 1918, and to proceed in said cause in a manner consistent with said opinion and mandate.

Sixteenth. The Court erred in overruling defendant's application for a change of venue duly presented and filed in said cause.

Seventeenth. The Court erred in refusing to hold that after said application for a change of venue had been filed and overruled, the Court was without jurisdiction to proceed further in this cause.

Eighteenth. The Court erred in holding that the decision and opinion of the Supreme Court of Missouri en banc heretofore rendered in

this cause on the 27th day of November, 1918, contained misstatements of fact.

Nineteenth. The Court erred in refusing the defendant's motion to strike out parts of the plaintiff's amended reply to defendant's answer in accordance with the written motion heretofore filed in this cause on the 10th day of April, 1919.

Twentieth. The Court erred in refusing to hold that on account of the failure to repay the loan on the policy in suit, which was admitted by the plaintiff, a condition of the insurance other than the nonpayment of premiums had been violated, and that therefore the plaintiff was not entitled to recover.

Twenty-first. The Court erred in instructing the jury that the plaintiff was entitled to recover interest against the defendant on the sum of fifty-two thousand nine hundred eleven dollars and
408 forty-three cents ($52,911.43) at 6 per cent per annum from the 20th day of November, 1906.

(Signed) FORDYCE, HOLLIDAY & WHITE,
Attorneys for Defendant.

On the 16th day of May, 1919, during the same term of said court, and within four days after the trial of said cause and the rendition of said verdict, defendant filed its motion in arrest of judgment, which is in words and figures (caption omitted) as follows:

Defendant's Motion in Arrest of Judgment.

Now at this day comes defendant herein and moves the Court to arrest the judgment rendered in this cause, and assigns for reasons or grounds for this motion:

First. That the second amended petition of the plaintiff filed herein does not state facts sufficient to constitute a cause of action against the defendant.

Second. That upon the face of the record said judgment is erroneous and void.

Third. That plaintiff's cause of action is based upon Section 7897 of the Revised Statutes of Missouri, 1899, but that to apply said section of the statute to the facts in this case is to give the same extraterritorial force and to deny to the defendant the equal protection of the laws and deprive the defendant of its property without due process of law, and deprive the defendant of its liberty of contract without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States,
409 and is to deny full faith and credit to the public acts, records and judicial proceedings of the State of New York, in violation of Section 1 of Article IV of the Constitution of the United States.

Fourth. That the case herein was under the law triable by a jury and a jury was not waived by the defendant, but that the Court instructed the jury to return a verdict for the plaintiff and thereby deprived the defendant of its right to a trial by jury in violation of Section 28 of Article II of the Constitution of the State of Missouri, and deprived the defendant of its property without due process of law, in violation of Section 30 of Article II of the Constitution of the State of Missouri, and of Article V and of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

Fifth. The Court exceeded its jurisdiction in refusing to follow the opinion and mandate of the Supreme Court of Missouri en banc heretofore rendered in this cause on the 27th day of November, 1918.

Sixth. That the Court had no further jurisdiction of this cause after defendant's application for a change of venue had been duly presented, filed and overruled.

(Signed) FORDYCE, HOLLIDAY & WHITE,
Attorneys for Defendant.

Defendant's Motion for New Trial and in Arrest of Judgment Overruled.

On the 30th day of June, 1919, during the June Term, 1919, of said court, by an order duly made and entered of record, the Court overruled defendant's said motions for a new trial, and in
410 arrest of judgment; to which action, ruling and order of the Court in overruling said motions for a new trial and in arrest of judgment, defendant, by its counsel, then and there duly excepted, and still excepts.

Appeal Granted.

On the 1st day of July, 1919, during the June Term, 1919, of said court, defendant filed its affidavit for appeal in said cause, in words and figures (omitting caption) as follows:

John H. Holliday, being duly sworn, makes oath and says that he is agent and attorney for the Mutual Life Insurance Company of New York, a corporation, defendant in the above-entitled cause; that the appeal prayed for in the above-entitled cause is not made for vexation or delay, but because the affiant believes that the appellant is aggrieved by the judgment and decision of the Court.

(Signed) JOHN H. HOLLIDAY.

Subscribed and sworn to before me, this first day of July, 1919. My commission expires April 9, 1923.

(Signed) WALTER R. MAYNE,
[SEAL.] *Notary Public.*

Thereupon, on the said 1st day of July, 1919, the Court caused the following order to be made and entered of record:

"One hundred and twenty days granted defendant in which to file bill of exceptions. Appeal bond fixed at $125,000.00. Affidavit for appeal filed and appeal allowed defendant to Supreme Court of Missouri."

411 And thereafter, to wit, on the 2nd day of July, 1919, during the same term of said court, the Court caused the following order to be made and entered of record:

"Appeal bond in the sum of $125,000.00 approved by Court and filed."

Bill of Exceptions Filed.

Inasmuch as the foregoing evidence, proceedings, matters, things, rulings and exceptions do not appear of record, and in order that the same may be made a part of the record in this cause, so as to be presented to said Appellate Court, defendant here now presents to the Court this, its bill of exceptions, and prays that the same may be settled and allowed, approved, signed and filed and ordered made a part of the record in this cause; all of which is accordingly done on this 26th day of September, 1919.

ROBERT W. HALL,
Judge of the Circuit Court of the City of St. Louis, Division No. 7.

O. K.:

JAMES J. O'DONOHOE,
Attorney for Plaintiff.
FORDYCE, HOLLIDAY & WHITE,
Attorneys for Defendant.

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And thereafter, and on the 27th day of January, 1920, the following further proceedings were had and entered of record in said cause, to-wit:

In the Supreme Court of Missouri in Banc.

21639.

MARY S. LIEBING, Respondent,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Appellant.

Come now the said parties, by their attorneys, and after argument herein, submit this cause to the Court.

And thereafter, and on the 13th day of December, 1920, the following further proceedings were had and entered of record in said cause, to-wit:

In the Supreme Court of Missouri in Banc.

21639.

MARY S. LIEBING, Respondent,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Appellant.

Appeal from the Circuit Court, City of St. Louis.

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of the City of St. Louis rendered, be affirmed upon condition that the said respondent, within ten days from the date hereof, enter a remittitur of the amount of the damages and attorney's fees included in the judgment herein, and that, otherwise, the said judgment be reversed and the cause remanded to the said Circuit Court for a new trial, in conformity with the opinion of this court herein delivered. (Opinion filed.)

And on the same day, to-wit, the 13th day of December, 1920, there was filed the opinion of said Supreme Court in said cause, which said opinion is in the words and figures following, to-wit:

Copy.

In the Supreme Court of the State of Missouri En Banc, October Term, 1920.

No. 21639.

MARY S. LIEBING, Respondent,

vs.

MUTUAL LIFE INS. CO. OF NEW YORK, Appellant.

Statement.

This suit was instituted in the Circuit Court of the City of St. Louis by the plaintiff against the defendant to recover the sum of $65,250.00 in gold, less certain credits to be later mentoined, alleged to be due her as the widow of Frederick W. V. Blees, and assignee of a policy of insurance issued by the defendant on the life of said Frederick W. V. Blees, a citizen of Macon County, Missouri, and of the United States of America.

The trial before the court and jury resulted in a verdict and judgment for the plaintiff in the sum of $107,542.09. After moving unsuccessfully for a new trial the defendant duly appealed the cause to this Court.

The petition upon which the case was tried was substantially as follows:

After pleading that the defendant was a corporation of New York, doing business under license in the State of Missouri, plaintiff alleged that on September 29th, 1901, at Macon, Missouri, Frederick W. V. Blees applied to defendant for a policy of insurance, and that on the 29th day of September, 1901, the defendant, at Macon, Missouri, issued its policy No. 1,207,072, filed with said petition, by which the defendant insured the life of said Blees and promised in case if his death and acceptance of due proofs thereof by the defendant to deliver to his executors, administrators or assigns fifty bonds of par value of $1,000.00 each, payable in twenty years, with interest at 5 per cent per annum, or at the option of said executors, administrators or assigns, to pay the sum of $65,250.00 in cash in lieu of said bonds; that Blees was a resident and citizen of Missouri; that he died on or about the 8th day of September, 1906; that the plaintiff is his widow and the assignee in said policy, and that all the conditions of the insurance were complied with by the insured during his lifetime and by the plaintiff since his death.

The petition next averred that Blees continued to pay the premiums on said policy until the 29th day of September, 1905, when he discontinued the payment of further premiums, and that at the time of the lapse, viz., September 29th, 1905, four annual premiums had been paid on the policy, and the value of the policy at said

date, under the non-forfeiture statutes of Missouri, amounted to $11,230.83.

That on the 12th day of October, 1904, Blees, the insured, and the plaintiff, at Macon, Missouri, made application to the defendant for a loan of $9,550, and signed and executed a loan agreement therefor, and that the defendant on or about said date, at the City of Macon, Missouri, loaned the insured said sum of $9,550 at 5 per cent per annum, the proceeds of said loan being distributed and applied as follows:

$4,290.50 to pay the annual premium due September 29, 1904.

$468.00 to pay interest on said loan to September 29, 1905, together with interest on said premium and

$4,790.50 in cash.

Plaintiff further says that, as above stated, at the date of lapse, namely, on the 29th day of September, 1905, the net or reserve value of said policy, calculated under non-forfeiture statutes of the State of Missouri, in such cases made and provided, amounted to the sum of eleven thousand two hundred and thirty dollars and eighty-three cents; that three-fourths of said net value is eight thousand four hundred and twenty-three dollars and twelve cents that deducting four thousand seven hundred and fifty-nine dollars and fifty cents therefrom (which is the aggregate amount applied to pay the premium due on the 29th day of September, 1904, and to pay interest on said loan and premium) leaves three thousand six hundred and sixty-three dollars and sixty-two cents, which sum ($3,663.62), taken or applied as a net single premium, as provided by the Missouri non-forfeiture statutes in force when said policy was issued, extends said policy in full force for the full amount written therein from date of lapse, September 29th, 1905, for a period of four years, nine months and eighteen days, and the insured died within said period, for he died on the 8th day of September, 1906; that is, eleven months and ten days from the 29th day of September, 1905, date of lapse.

Plaintiff further states that she has elected to take cash in lieu of bonds.

Plaintiff further states that at the time said policy was issued the insured was of the age of 41 years, and the highest gross annual ordinary life premium per thousand ever charged by defendant on a policy issued at age 41 years is thirty-four dollars and sixteen cents (this is equal to or greater than the ordinary life premium mentioned in the Missouri non-forfeiture statutes); that the gross annual ordinary life premium on the policy is suit, calculated at the rate of thirty-four dollars and sixteen cents per thousand is the sum of two thousand two hundred and twenty-eight dollars and ninety-four cents ($2,228.94); and the interest thereon at the rate of 6 per cent per annum from the date when due (the 29th day of September, 1905) to the day the insured died (the 8th day of September, 1906—11 months, 10 days) amounts to the sum of one hundred and twenty-five dollars and ninety-eight cents ($125.98).

Plaintiff further states that interest at the rate of 5 per cent per annum is due and unpaid on said loan of nine thousand five hundred and fifty dollars from the 12th day of October, 1905, to the

8th day of September, 1906, the day the insured died; that is, ten months twenty-seven days, and amounts to the sum of four hundred and thirty-three dollars and sixty-five cents ($433.65).

Plaintiff further states that said unpaid gross annual ordinary life premium ($2,228.94), and interest thereon ($125.98), together with said loan ($9,550.00), and interest thereon ($433.65), aggregate the sum of $12,338.57, and that the same may be deducted from the face amount of said policy ($65,250.00), being, as plaintiff believes, a proper deduction therefrom under the non-forfeiture laws of the State of Missouri, thus reducing said policy to the sum of $52,911.43.

Plaintiff further states that at the City of Macon, Missouri, Frederick W. V. Blees duly assigned said policy to plaintiff and said defendant accepted said assignment and acquiesced therein in said city and state; that the premiums which were paid on said policy were thus paid to defendant in the State of Missouri.

Plaintiff further states that on divers occasions prior to the institution of this action especially on or about the 3rd day of November, 1906, plaintiff duly demanded of defendant payment of the amount due under said policy, but said defendant, on sundry occasions, particularly on the 20th day of November, 1906, vexatiously refused to pay the same or any part thereof, and then and there vexatiously disclaimed all liability under said policy.

Wherefore, plaintiff prays for judgment against defendant for the sum of fifty-two thousand nine hundred and eleven dollars and forty-three cents, with interest thereon at the rate of 6 per cent per annum from the 20th day of November, 1906 (the date defendant denied liability under said policy), together with 10 per cent on the amount due under said policy as damages and a reasonable fee for her attorney's services in preparing and prosecuting this action because of the vexatious refusal of defendant to pay said policy.

The answer contained the following defences:

1. A general denial.

2. A plea admitting the issuance of the policy and the payment of four annual premiums thereon, the assignment of the policy to the plaintiff, the execution of the loan agreement, which was set out in full in the answer. That said loan agreement was accepted by the defendant in the City and State of New York, and the loan made in the City and State of New York, and that the loan agreement and policy remained from the date thereof, viz., October 12th, 1904, in the possession of the defendant in the State of New York; that the premium due on the policy, September 29th, 1905, was not paid nor was the loan paid. That thereafter, in accordance with the provisions of the loan agreement the policy was canceled and the surrender value thereof, namely, the sum of $9,550.00, applied in payment of the loan of like amount.

The answer then pleaded the common law of New York and the statute law of New York, and averred that the loan agreement was governed by these laws, was valid under these laws, and that the action taken in canceling the policy was according to the laws of

the State of New York, and that to deny to the defendant the benefit of said laws in the State of New York would be to refuse to give full faith and credit of the public acts, records and judicial proceedings in the State of New York, in violation of Section 1 of Article 4 of the Constitution of the United States, and to deny to the defendant the equal protection of the laws, and to deprive the defendant of its property without due process of law in violation of Section 1 of the 14th Amendment to the Constitution of the United States.

3. The answer next set up the issuance of this policy, the assignment of the same to the plaintiff, the failure to pay premium and loan on September 29th, 1905; that the repayment of the loan was a condition of the insurance provided for in the policy, and the failure to repay the same was a violation of said condition, and, therefore, there had been a violation of a condition of the insurance other than the non-payment of premiums at the death of the insured and therefore the plaintiff was not entitled to claim extended insurance on said policy under the provisions of Section 6948 R. S. of Missouri 1909.

4. The answer next set up the fact that Section 7897 R. S. of Missouri 1899, was amended by Act of the Legislature of Missouri at its session in 1903, and that by the terms of said amendment the defendant was permitted to deduct from three-fourths of the net value of the policy, computed in accordance with the statute, any indebtedness to the company on the policy, and that deduction from three-fourths of the net value of the policy on September 29th, 1905, said loan of $9,550.00 then unpaid on said policy, did not leave any reserve for extended insurance; that neither the insured nor the plaintiff were entitled to a loan on the policy until after the 29th day of September, 1904; that no right to extended insurance vested in the insured or in the plaintiff either under the policy or by statute, until September 29th, 1904; that said amendment to the statute took effect on the 21st day of June, 1903, long prior to said 29th day of September, 1904, and that, therefore, said amendment applies to and governs the policy in suit, and that to require the defendant to pay the policy would be to deny to the defendant the equal protection of the laws and to deprive the defendant of its property without due process of law in violation of Section 1 of the 14th Amendment to the Constitution of the United States and of Section 30 of Article 2 of the Constitution of Missouri.

Reply.

The reply, after repeating the allegations of the petition to the effect that the policy in suit was carried in extended insurance under the non-forfeiture laws of the State of Missouri, and averring that the loan agreement and all transactions concerning the same are Missouri contracts governed by the laws of Missouri, went on to set out the history of this case, and averred that the loan agreement and

the action taken thereunder had been held null and void under the first decision of the Supreme Court.

The reply next averred that the defendant had waived the right to plead the laws of New York and that to apply the laws of New York in this case would be to violate the statutory rights of the plaintiff, who was a citizen of Missouri and entitled to have the Missouri laws apply.

The reply next averred that since neither the application nor the rules of the defendant nor the loan agreement nor a copy thereof were attached to the policy, they could not be considered in this case, either under the laws of Missouri or under the laws of New York.

The next averment was that since the policy provided for the loan, the loan agreement was a subsidiary contract and not independent of the policy and could impose no conditions not set out in the policy.

The next averment was that the defendant was precluded from denying liability on this policy on account of the clause relating to incontestibility in the policy.

The next averment was that under the laws of New York the plaintiff could not make loans and take a pledge of its policies as collateral security and that its acts in this connection were ultra vires.

The next averment was that a contract agreeing that in case of default the insurer might without notice or demand cancel the policy was null and void under the laws of New York.

The next averment was that the cash value of the policy under the laws of New York was not the true value of the policy and that there was a distributive share of surplus on this policy at the time of default more than sufficient to pay the premium due September 29th, 1905.

The next averment was that under the laws of New York the plaintiff, being the wife of the assignor, could not transfer the policy without the written consent of her husband.

The next averment was that the loan agreement was usurious under the laws of the State of New York.

The next averment was that the policy had a value in excess of the surrender value named in the policy and that this excess was sufficient to carry the policy in extended insurance.

The next averment was that the policy had a reserve value in excess of the sum received by the insured as a loan, and that this excess was sufficient to carry the policy in extended insurance.

The next averment was that under the laws of the State of New York defendant was not entitled to foreclose on the policy when the loan was not paid.

The final averment was that the loan agreement was a Missouri contract and governed by the laws of the State of Missouri.

Plaintiff's Evidence.

On the part of plaintiff, evidence was introduced tending to establish that Frederick W. V. Blees, a citizen of the United States and a resident and citizen of the State of Missouri, at Macon City

in said State, in September, 1901, made written application to defendant for the policy in suit, and on or about the 29th day of September, 1901, the policy applied for was delivered to him at Macon, Missouri, by Dwight H. Payson, the defendant's Macon representative, to whom he then and there paid the first annual premium. By stipulation entered into by the parties in the City of New York on April 25th, 1919, it was, in part, agreed:

That on or about the 7th day of October, 1904 Fred W. V. Blees and Mary S. Blees, his wife (now Mary S. Liebing, plaintiff herein), signed the certain loan agreement heretofore received in evidence in this case in the City of Macon and State of Missouri, and delivered said loan agreement so signed, together with the policy in suit No. 1207072, to one Dwight H. Payson, then a soliciting agent of the defendant at Macon, Missouri; that said Dwight H. Payson, on or about the said 7th day of October, 1904, forwarded said loan agreement and policy to F. N. Cheney, the then manager of the defendant company's St. Louis Office, and that said F. N. Cheney transmitted said loan agreement and policy to the Home Office of the defendant company in the City of New York on or about the 8th day of October, 1904, and that said loan agreement and policy were received at the defendant company's office in the City of New York and State of New York on the 10th day of October, 1904.

That on or about the 12th day of October, 1904, the defendant transmitted a check on the American Exchange National Bank of New York in the sum of four thousand seven hundred ninety dollars and fifty cents, ($4,790.50), payable to Frederick W. V. Blees and Mary S. Blees, being the balance due said Frederick W. V. Blees on the loan of nine thousand five hundred fifty dollars ($9,550) made by said Frederick W. V. Blees and Mary S. Liebing on the policy in suit, after the deduction of four thousand two hundred ninety-one dollars and fifty cents ($4,291.50) which was applied to pay the premium due on said policy on the 29th day of September, 1904, and four hundred sixty-eight dollars ($468) interest.

That said check was by the defendant mailed from its home office in the City of New York and State of New York to the City of St. Louis and State of Missouri, addressed to Mr. F. N. Cheney who was defendant's then manager in charge of its St. Louis, Missouri, office.

* * * * * * *

That thereafter, on or about the — day of October, 1904, Mr. F. N. Cheney, who was defendant's then manager in charge of its St. Louis, Missouri, office, as aforesaid, forwarded said check to Mr. Dwight H. Payson, who was defendant's then soliciting agent at Macon, Missouri, and that thereafter, on or about the — day of October, 1904, Mr. Dwight H. Payson delivered said check to Frederick W. V. Bleese, the insured.

On or about the 18th day of October, 1904, the insured and plaintiff endorsed said check and the former deposited the same in the National Bank of Commerce at St. Louis.

W. B. Oowen, vice president of the bank, testified that the insured was given credit for the check by the bank and that the same was not deposited for collection. He testified:

Q. Now if it were deposited for collection, would there be any number on it?
A. Yes, there would.
Q. And there is not a number on it?
A. No, sir.
Q. It was treated as a cash transaction between the depositor and the bank?
A. Yes, sir.

On cross-examination, the witness testified that in the event the check was not paid the bank would charge it back immediately to insured's account.

The premiums were paid at Macon to Mr. Payson defendant's Macon representative. And plaintiff was asked:

Q. Did Mr. Blees or yourself have any transaction with the home office in New York?
A. No, sir.

On cross-examination, plaintiff was asked concerning the payment of the fourth annual premium, namely:

Q. Well, wasn't the premium due September 29th, 1904, paid out of that loan?
A. Yes, it was agreed by both Mr. Blees and myself and Mr. Payson, first the premium was to be paid, and a year's interest in advance on the loan.

The insured, after he had paid four annual deposits, discontinued the payment of further deposits, and at that time, namely, on the 29th day of September, 1905, the policy had acquired a net value under the non-forfeiture statutes of Missouri, of $11,230.83; that three-fourths thereof is $8,423.12, and deducting $4,759.50 (which is the aggregate amount applied to pay the deposit due on the 29th day of September, 1904, and to pay interest on said loan and premium) leaves $3,663.62, which sum, taken as a net single premium as commanded by the Missouri non-forfeiture statute, extends the said policy from date of lapse (September 29th, 1905) for a period of four years, nine months and eighteen days.

The insured died on the 8th day of September, 1906; that is, eleven months and ten days from the 29th day of September, 1905. He died within the extended insurance period.

Neither the insured nor plaintiff paid the loan, which was due on the 29th day of September, 1905, but the alleged forclosure, concellation of the policy and appropriation of the surrender value thereof to repay the loan, did not occur, according to defendant's answer, until the 15th day of November, 1905, and did not occur, according to its evidence until December 4, 1905.

On or about the 2nd day of March, 1904, at Macon, Missouri, the insured assigned the policy to plaintiff.

Plaintiff testified that neither the insured nor plaintiff had any notice of the maturity of the loan, neither had they any notice of the time when defendant intended to foreclose or of the alleged foreclosure. And no demand for repayment of said loan or fifth annual premium was ever made on either of them.

On redirect examination, plaintiff testified:

Q. If you had notice of the maturity of the loan and premium, what would you have done?

A. Why, I would have tired to have seen why Mr. Blees didn't look after it, and if he didn't look after it I would have looked after it myself.

She further testified that she was financially able and would have paid the fifth annual premium, as well as the loan and interest on it, if she had been notified of their maturity or nonpayment. She testified, too, that she, "owned considerable property at that time; I owned all the best corners in Macon, Missouri, at that time myself; I had a 780-acre farm out there; I owned nearly two-thirds of the carriage factory stock at that time."

Soon after the death of the insured the plaintiff employed the law firm of Dysart & Mitchell of Macon, Missouri, to collect said policy, and that firm wrote a letter, dated the 3rd day of November, 1906, to Mr. Fred N. Chesney, the defendant's St. Louis Manager, inquiring about the value of said policy. This letter was answered on November 20th, 1906, within ninety days after the insured died, by Mr. James McKean, the defendant's then general colicitor, in which answer he stated that the policy was not in force at the time the insured died.

Thereafter, Mr. Frederick L. Allen, the defendant's general solicitor, took the same position, although his attention was called to the nonforfeiture statutes of Missouri, and the decisions of the Court construing the same. Proofs of death were furnished to defendant within ninety days after the insured's death under another policy issued by it on his life.

John B. Dempsey, a lawyer of thirty year's practice, testified that in his opinion twenty-five thousand dollars would be reasonable attorney's fee. And Frederick H. Bacon, the author of the Standard Treatise on the general law of insurance, testified that, in his opinion, a reasonable attorney's fee in the case would be from fifteen to twenty-five thousand dollars.

Defendant's Evidence.

The principal evidence offered by defendant was the depositions of Allan McCulloch, general counsel for Equitable Life, and James H. McIntosh, general counsel for New York Life, together with certain unpleaded New York and Federal decisions, to prove that the loan agreement and the pledge of the policy and its cancellation for failure to repay the loan were valid and legal under the laws of the State of New York. And for the same purpose, defendant offered in evidence Section 16 of Chapter 218 of the laws of New York, 1897.

It offered also Section 21 of Chapter 272 of the Laws of New York, 1896, concerning the powers of married women.

Plaintiff objected to said evidence.

The Court excluded the evidence on grounds, among which are: (1) That the right, if it ever existed, to invoke the New York laws as a defense, was waived by defendant's failure to timely enough lodge said laws as a defense herein; and further "going to trial on the original theory, defending on the original theory." The court relied on "State ex rel. v. Reynolds et al., 208 S. W. (Mo.), 618."

(2) Because "In view of the first decision, which was res adjudicata in this case. For the further reason, I say, the decision in the 269th Missouri, 509, was res adjudicata in this case."

(3) That the policy and loan agreement were Missouri contracts and controlled by Missouri Law; that the facts in the instant case were altogether different from those in the Dodge Case; for Dodge corresponded with the home office; and the Court observed, too, that; "It makes considerable of a difference whether he bound himself to be governed by the New York law or not." (See Lange v. Ins. Co., 254 Mo., 488; Mutual Life v. Cohen, 179 U. S., 551.)

(4) That the facts as developed on this trial are essentially different from those on the second trial, especially so because of the stipulation offered in evidence.

Application was made by defendant's counsel at the close of the whole case for stay of proceedings until counsel could apply to the Supreme Court for a writ of prohibition. The application being overruled, counsel then presented an application for change of venue, which was likewise overruled, as was its demurrer to the evidence.

The Court gave a peremptory instruction to find for plaintiff in the sum of $52,911.43 (which represents the amount due under policy after deducting loan, premiums and interest), with interest at 6 per cent per annum, from November 20, 1906, and left to the jury the questions of damages and attorney's fee. The verdict and judgment, as before stated, was for the plaintiff.

Opinion.

This is the third appeal of this case to this Court. The opinion delivered on the first appeal is reported under the heading of "Liebing vs. Mutual Life Ins. Co., 269 Mo. 509," and the opinion delivered on the second appeal may be found under the same heading, reported in the "207 S. W. 230."

The pleadings are unnecessarily long, covering some fifty-six printed pages, but with the valuable assistance of counsel we have reduced them to a comparatively small compass, without omitting any material issue presented thereby.

There are many propositions presented and discussed in briefs by counsel for each party, but from the view we take of the case only one of them is worthy of consideration and that is: Is the Dodge case controlling in this one? We so held in the case of "Liebing vs.

Mutual Life Insurance Co., 207 S. W. 230"; but upon re-consideration of that case we are of the opinion that the contention there announced was erroneous and should not be adhered to. In the Dodge case the language of the policy about loans is this: "Cash loans can be obtained by the insured on the sole security of this policy, on demand, at any time after this policy has been in force two full years," etc.

In the Liebing case the policy provides for loans as follows: "After this contract shall have been in force three full years, within sixty days after written application and upon the assignment of this contract as security, the company will, in conformity with its rules, then in force, loan amounts," etc. In my opinion the differentiation between the language of the two policies is marked—in the Dodge case there was no absolute agreement on the party of the Company to loan the insured any sum of money, but simply a provision that "Cash loans can be obtained," etc., which leaves it only optional with the Company to make the loan, while in the Blees policy, regarding the same subject, it provides that "within sixty days after written application and upon the assignment of this contract as security, the Company will * * * loan amounts," etc. Here the agreement to make the loan is absolute and unequivocal and imposed an absolute legal obligation on the Company to make the loan, which it did in pursuance to that obligation. It therefore is apparent that the loan agreement found in the Blees policy was a subsidiary and supplementary contract to the policy, instead of an independent and collateral contract. That being true it is controlled by the same section of the statute that controls the policy itself, to-wit: "Sec. 7897 R. S. 1909." Again:

1. The loan agreement in the Dodge case expressly recites that the application was made to said company at its home office in the City of New York, was accepted, the money paid by it and the agreement made and delivered there; that the principal and interest were payable there; and "that this contract is made under and pursuant to the laws of the State of New York, the place of said contract being said home office of said company."

2. There was no such agreement in the Blees contract. All that is said in the Blees loan agreement is: "And said parties of the second part agree to repay the sum of $9,550 to the company at its head office, Nassau, Cedar, and Liberty Streets in the City of New York on Sept. 29, 1905."

3. In the Blees case the application for the loan was made to the local agent at Macon, was transmitted by him to the general Missouri agent at St. Louis, was sent by the latter to New York and draft for the loan was forwarded from New York to the General Agent in St. Louis, he transmitted it to the Local Agent at Macon, and he turned it over to Blees at Macon. The question is: Does the bare fact that the debt was to be paid in New York, make it a New York contract between the Bleeses and the company, so as to take it out of the operation of Sec. 7897 R. S. 1909?

I think not.

4. The head and the Dodge case with the dissenting opinion in the latter, throw much light on the questions involved.

5. Undoubtedly the loan agreement was a Missouri contract, for the reasons it was made here, and for the reason that it was but subsidiary to the policy, which is admitted to be a Missouri contract, then said Sec. 7897 would prevent the deduction from three-fourths of the net value of the policy as extended unsurance, any indebtedness of the insured to the company except an indebtedness for past-due premiums; and with that indebtedness alone deducted, the Blees policy is still in force, notwithstanding the cancellation of the company.

6. I have not paid any attention to the proposition of the plaintiff that the company waived the benefit of the New York law by not pleading them in the first instance. I think if the loan agreement was a New York contract, its effect ought to be determined by the New York law; and if it is a Missouri contract, by our law. Still I do not say there is anything in that point; I simply have not investigated it.

7. I do not see any material difference between the facts at the last trial and those before the court on the second appeal, though the plaintiff stren-ously contends there is a difference.

8. It is manifest to my mind that the facts of this case do not show a vexatious refusal by the company to pay the policy, and hence the damages and attorneys' fee for vexatious appeal should not have been found or the question left to the jury to find. I think in any event those sums ought to be remitted, and if so entered by the respondent within ten days from this date, the judgment will be affirmed, otherwise it will be reversed and remanded to the Circuit Court to be retired in compliance with the views herein expressed.

I am greatly indebted to my learned associate, Judge Goode, for the valuable assistance he has rendered me in the preparation of this opinion.

Williamson and Goode, J. J., concur. Blair, J. concurs in result. Graves, J., dissents in separate opinion, in which Walker, C. J., and Williams, J., concur.

(Signed) A. M. WOODSON,
Judge.

And on the same day, to wit, the 13th day of December, 1920, there was filed in said court the dissenting opinion of Graves, J., which said dissenting opinion is in the words and figures following, to wit:

In the Supreme Court of Missouri, en Banc, October Term, 1920.

No. 21639.

MARY S. LIEBING, Respondent,

vs.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Appellant.

I dissent from the majority opinion herein, and for my dissent file herein the attached opinion which I had prepared for the opinion in the case. I do this because it covers all the questions in the case, and whilst its verbiage is not that of a dissenting opinion, it will answer for such purpose.

Walker C. J. and Williams, J. concur in this dissent.

(Signed) W. W. GRAVES, *J.*

In the Supreme Court of Missouri, en Banc, October Term, 1919, January Call.

No. 21639.

MARY S. LIEBING, Respondent,

vs.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Appellant.

This is the third appeal in this case. Many of the prior pertinent facts may be gathered from our previous opinions, although the questions at issue have been more or less shifted upon each return of the case to the circuit. The action is one upon a life insurance contract. When first here (269 M. 509) it came upon the appeal of the plaintiff. Suffice it to say that this opinion was prior to that of N. Y. Life Ins. Co. vs. Head, 234 U. S. 149, and after Head vs. N. Y. Life Ins. Co. 241 M. 403, being the same case in the two different courts. When this case was first here, the trial court had sustained defendants' demurrer to plaintiffs' evidence hence the matters of defense were not really at issue, although the loan agreement was pleaded. When the case came here a second time (207 S. W. 230) the U. S. Supreme Court had spoken, and we then reversed a judgment for the plaintiff, and remanded the cause. The pleadings again took new form, so that for this case a short outline of the case should be made. The chief change in the pleadings upon the third trial below, was in the reply, which was voluminous, and plead both law and facts. The appellant has made a fair outline of the pleadings upon which the case was last tried, and as such outline is as short as we could make of pleadings of the volume here involved, we use it:

"After pleading that the defendant was a corporation of New York, doing business under license in the State of Missouri, plaintiff averred that on September 29th, 1901, at Macon, Missouri, Frederick W. V. Blees applied to defendant for a policy of insurance, and that on the 29th day of September, 1901, the defendant at Macon, Missouri, issued its policy No. 1,207,072, filed with said petition, by which the defendant insured the life of said Blees and promised in case of his death and acceptance of due proofs thereof by the defendant to deliver to his executors, administrators or assigns fifty bonds of par value of $1,000.00 each, payable in twenty years, with interest at 5 per cent per annum, or at the option of said executors, administrators or assigns, to pay the sum of $65,250.00 in cash in lieu of said bonds; that Blees was a resident and citizen of Missouri; that he died on or about the 8th day of September, 1906; that the plaintiff is his widow and the assignee in said policy, and that all the conditions of the insurance were complied with by the insured during his lifetime and by the plaintiff since his death.

The petition next averred that Blees continued to pay the premiums on said policy until the 20th day of September, 1905, when he discontinued the payment of further premiums, and that at the time of lapse, viz., September 29th, 1905, four annual premiums had been paid on the policy, and the value of the policy at said date, under the non-forfeiture statutes of Missouri, amounted to $11,230.83.

That on the 12th day of October, 1904, Blees, the insured, and the plaintiff, at Macon, Missouri, made application to the defendant for a loan of $9,550, and signed and executed a loan agreement therefor, and that the defendant on or about said date, at the City of Macon, Missouri, loaned the insured said sum of $9,550, at 5 per cent per annum, the proceeds of said loan being distributed and applied as follows:

$4,290.50 to pay the annual premium due September 29th, 1904.
-468.00 to pay interest on said loan to September 29th, 1905, together with interest on said premium, and
-4,790.50 in cash.

That on said 29th day of September, 1905, three-fourths of the net value of said policy, computed in accordance with the non-forfeiture laws of the State of Missouri, amounting to $8,423.12; that deducting therefrom the sum of $4,759.50, being the amount of said loan applied to past due premium and interest, left $3,663.62, which applied as a net single premium, in accordance with the non-forfeiture statutes of Missouri, in force when said policy was issued, extended said policy in full force for the amount written therein from September 29th, 1905, for a period of four years, nine months and eighteen days, and that the insured died on September 8th, 1906.

The petition further averred that the plaintiff had elected to take cash in lieu of bonds; that at the time the policy was issued the insured was 41 years of age; that the highest gross annual premium per thousand charged by the defendant on policies issued at age of 41 was $34.16, which was equal to or greater than the premium mentioned in the Missouri non-forfeiture law. That the gorss annual

ordinary life premium on the policy in suit, calculated on said figures, was $2,298.94, and that the interest thereon at the rate of 6 per cent from September 29th, 1905, to the date of the death of the insured, September 8th, 1906, amounting to $125.98; that the interest on the loan from October 12th, 1905, to September 8th, 1906, amounted to $433.65; that deducting the unpaid gross annual premiums and interest, together with the loan and interest, in all the sum of $12,338.37, from the face of the policy reduced the policy to the sum of $52,911.43. That the insured had assigned this policy to the plaintiff in the City of Macon, Missouri, and that the defendant had accepted said assignment and that the premiums paid on the policy were paid to the defendant in the State of Missouri. That the plaintiff had, on divers occasions, demanded payment of the policy from the defendant, but that the defendant had vexatiously refused to pay, and the petition concluded with a prayer for judgment for $52,911.43, with interest at 6 per cent from November 20, 1906, together with 10 per cent as damages and reasonable attorney's fees for vexatious refusal to pay.

Answer.

The answer contained the following defenses:

First. A general denial.

Second. A plea admitting the issuance of the policy and the payment of four annual premiums thereon, the assignment of the policy to the plaintiff, the execution of the loan agreement, which was set out in full in the answer. That said loan agreement was accepted by the defendant in the City and State of New York, and the loan made in the City and State of New York, and that the loan agreement and policy remained from the date thereof, viz., October 12th, 1904, in the possession of the defendant in the State of New York; that the premium due on the policy, September 29th, 1905, was not paid nor was the loan paid. That thereafter, in accordance with the provisions of the loan agreement the policy was canceled and the surrender value thereof, namely, the sum of $9,550.00, applied in payment of the loan of like amount.

The answer then pleaded the common law of New York and the Statute law of New York, and averred that the loan agreement was governed by these laws, was valid under these laws, and that the action taken in canceling the policy was according to the laws of the State of New York, and that to deny to the defendant the benefit of said laws in the State of New York would be to refuse to give full faith and credit of the public acts, records and judicial proceedings in the State of New York, in violation of Section 1 of Article IV of the Constitution of the United States, and to deny to the defendant the equal protection of the laws, and to deprive the defendant of its property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Third. The answer next set up the issuance of the policy, the assignment of the same to the plaintiff, the failure to pay premium and

loan on September 29th, 1905; that the repayment of the loan was a condition of the insurance provided for in the policy, and the failure to repay the same was a violation of said condition, and, therefore, there had been a violation of a condition of the issurance other than the non-payment of premiums at the death of the insured and therefore the plaintiff was not entitled to claim extended insurance on said policy under the provisions of Section 6948, R. S. of Missouri 1909.

Fourth. The answer next set up the fact that Section 7897, R. S. of Missouri 1899, was amended by Act of the Legislature of Missouri at its session in 1903, and that by the terms of said amendment the defendant was permitted to deduct from three-fourths of the net value of the policy, computed in accordance with the statute, any indebtedness to the company on the policy, and that deducting from three-fourths of the net value of the policy on September 29th, 1905, said loan of $9,550.00 then unpaid on said policy, did not leave any reserve for extended insurance; that neither the insured nor the plaintiff were entitled to a loan on the policy until after the 29th day of September, 1904; that no right to extended insurance vested in the insured or in the plaintiff either under the policy or by statute, until September 29th, 1904; that said amendment to the statute took effect on the 21st day of June, 1903, long prior to said 29th day of September, 1904, and that, therefore, said amendment applies to and governs the policy in suit, and that to require the defendant to pay the policy would be to deny to the defendant the equal protection of the law and to deprive the defendant of its property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and of Section 30 of Article II of the Constitution of Missouri.

Reply.

The reply, after repeating the allegations of the petition to the effect that the policy in suit was carried in extended insurance under the non-forfeiture laws of the State of Missouri, and averring that the loan agreement and all transactions concerning the same and Missouri contracts governed by the laws of Missouri, went on to set out the history of this case, and averred that the loan agreement and the action taken thereunder had been held null and void under the first decisions of the Supreme Court.

The reply next averred that the defendant had waived the right to plead the laws of New York and that to apply the laws of New York in this case would be to violate the statutory rights of the plaintiff, who was a citizen of Missouri and entitled to have the Missouri laws apply.

The reply next averred that since neither the application nor the rules of the defendant nor the loan agreement nor a copy thereof were attached to the policy, they could not be considered in this case either under the laws of Missouri or under the laws of New York.

The next averment was that since the policy provided for the loan the loan agreement was a subsidiary contract and not independent of the policy and could impose no conditions not set out in the policy

The next averment was that the defendant was precluded from denying liability on this policy on account of the clause relating to incontestability in the policy.

The next averment was that under the laws of New York the plaintiff could not make loans and take a pledge of its policies as collateral security and that its acts in this connection were ultra vires.

The next averment was that a contract agreeing that in case of default the insurer might without notice or demand cancel the policy was null and void under the laws of New York.

The next averment was that the cash value of the policy under the laws of New York was not the true value of the policy and that there was a distributive share of surplus on this policy at the time of default more than sufficient to pay the premium due September 29th, 1905.

The next averment was that under the laws of New York the plaintiff, being the wife of the assignor, could not transfer the policy without the written consent of her husband.

The next averment was that the loan agreement was usurious under the laws of the State of New York.

The next averment was that the policy had a value in excess of the surrender value named in the policy and that this excess was sufficient to carry the policy in extended insurance.

The next averment was that the policy had a reserve value in excess of the sum received by the insured as a loan, and that this excess was sufficient to carry the policy in extended insurance.

The next averment was that under the laws of the State of New York defendant was not entitled to foreclose on the policy when the loan was not paid.

The final averment was that the loan agreement was a Missouri contract and governed by the laws of the State of Missouri."

Defendant moved to strike out much of this reply, but the motion was overruled. Upon a trial before the jury the court peremptorily instructed the jury to find for the plaintiff in the sum of $52,911.43 with interest thereon at the rate of 6% per annum from Nov. 20th 1906 to date of trial. The court left it to the jury to determine the question of the 10 per cent penalty asked and the matter of attorney's fee. Eleven jurors, out of the twelve, returned a verdict for $107,-142.09, (by items) in favor of the plaintiff. The items were (1) $52,911.43, the amount due under the policy, (2) $39,630.66 interest on same, (3) damages $5,000, and (4) attorney's fee $10,-000.00, making the grand total of $107,542.09, supra. From a judgment on such verdict, the defendant has appealed. Pertinent portions of the facts in evidence will be left to the opinion.

I.

This is an action upon an insurance contract on the life of Frederick W. V. Blees who at the time of the issuance of the contract was a resident of Macon, Missouri. The policy was issued Sept. 29th 1901. The required annual payments were made for four consecutive years. To meet the last of the four annual payments, Blees and

his then wife (the plaintiff here) made a loan with defendant, and in this way procured the sum of $9,550.00, out of which *said* paid (1) $4,291.50, the premium due upon Sept. 29th 1905, (2) $468.00 the interest in advance on said loan, and $4,790.50 in cash to the order of Blees and his wife. The latter was by check on American Exchange Bank of New York, which was forwarded to the insured and afterward paid by the bank in New York. This loan was by an agreement in writing made upon an application of Blees and his wife. The insurance contract provided:

Loans.—After this contract shall have been in force three full years, within sixty days after written application, and upon the assignment of this contract as security, the company will, in conformity with its rule as then in force, loan amounts within the limits of the cash surrender value, with interest in advance, at the rate of five per cent per annum, provided: (1) that the deposits be fully made to the end of the contract year in which the loan falls due; (2) that in any settlement of this contract all outstanding indebtedness hereon to the company must be paid. All payments hereon of loans and interest shall be made in gold coin."

On or about Oct. 7th 1904, the following agreement was signed at Macon, Mo., by Blees and wife:

This agreement made this 12 day of Oct. 1904 between The Mutual Life Insurance Company of New York, party of the first part, hereinafter called the Company, and Frederick W. and Mary S. Blees parties of the second part, witnesseth:

The Company agrees to loan to the parties of the second part the sum of Ninety five hundred and fifty dollars apportioned as follows:

To pay premiums on Policy No. 1207072 to 29 day of Sept. 1905	$4,291.5
Interest at 5% (adjusted also for interest on premiums)	468.(
Balance by Company's check	4,790.5
	$9,550.(

The receipt of the foregoing amount as a loan is hereby acknowledged upon the pledge as hereinafter set forth of Policy No. 1207(in said Company. And the said parties of the second part agree to repay the said sum of $9,550 to the Company at its Head Office Nassau, Cedar and Liberty Streets, in the City of New York, on the 29 day of Sept. 1905.

In consideration of the amount of said loan the parties of the second part hereby assign, transfer and set over all of the right, title and interest in and to *said* Policy No. 1207072 issued by said Company on the life of Frederick W. V. Blees together with any and all moneys which may be or become payable under the same, to the Company as collateral security for the payment of said loan with interest, the said parties of the second part will forever warrant and defend the title of the said Company to the said Policy.

In the event of default in the payment of said loan on the date herein above mentioned, the Company is hereby authorized at its option, without notice and without demand for payment, to cancel said policy, and apply the customary cash surrender consideration then allowed by the Company for the surrender for cancellation of similar policies, namely, $9,550 to the payment of said loan with interest, the balance, if any, to be payable to the parties entitled thereto on demand, or the company may at its own option renew the said loan for one year or less period on the written request of any one of the parties of the second part hereto, and without further notice to any one of the parties of the second part.

In witness whereof, the said parties have executed these presents the day and year first above written.

FREDERICK W. V. BLEES,
Macon, Mo.

MARY S. BLEES,
Macon, Mo."

Witness: D. H. PAYSON.
Witness: G. EUGENE LAIN.

From the evidence it appears that prior to this loan agreement, and in about March 1904, the policy of insurance had been assigned to Mrs. Blees. There was a stipulation as to the facts with reference to this loan agreement. The material portions read:

"That on or about the 7th day of October, 1904, Fred W. V. Blees and Mary S. Blees, his wife (now Mary S. Liebing, plaintiff herein), signed the certain loan agreement heretofore received in evidence in this case in the City of Macon and State of Missouri, and delivered said loan agreement so signed, together with the policy in suit No. 1,207,072, to one Dwight H. Payson, then a soliciting agent of the defendant at Macon, Missouri; that said Dwight H. Payson on or about said 7th day of October, 1904, forwarded said loan agreement and policy to F. N. Cheney, the then manager of the defendant company's St. Louis office, and that said F. N. Cheney transmitted said loan agreement and policy to the Home Office of the defendant company in the City of New York on or about the 8th day of October, 1904, and that said loan agreement and policy were received at the defendant company's office in the City of New York and State of New York on the 10th day of October, 1904.

That on or about the 12th day of October, 1904, the defendant transmitted a check on the American Exchange National Bank of New York in the sum of four thousand seven hundred ninety dollars and fifty cents ($4,790.50), payable to Frederick W. V. Blees and Mary S. Blees, being the balance due said Frederick W. V. Blees on the loan of nine thousand five hundred fifty dollars ($9,550) made by said Frederick W. V. Blees and Mary S. Liebing on the policy in suit, after the deduction of four thousand two hundred ninety-one dollars and fifty cents ($4,291.50), which was applied to pay the premium due on said policy on the 29th day of September, 1904, and four hundred sixty-eight dollars ($468) interest.

That said check was by the defendant mailed from its Home O fice in the City of New York and State of New York to the City St. Louis and State of Missouri, addressed to Mr. F. N. Chene who was defendant's then manager in charge of its St. Louis, M souri, office.

That accompanying said check was the following letter:

* * * * * * *

That thereafter, on or about the — day of October, 1904, Mr. N. Cheney, who was defendant's then manager in charge of its Louis, Missouri, office as aforesaid, forwarded said check to M Dwight H. Payson, who was defendant's then soliciting agent Macon, Missouri, and that thereafter, on or about the — day of O tober, 1904, Mr. Dwight H. Payson delivered said check to Frederi W. V. Blees, the insured.

That thereafter, on or about the 18th day of October, 1904, s Frederick W. V. Blees and Mary S. Blees endorsed said check a deposited the same with the National Bank of Commerce in Louis, Missouri.

That said National Bank of Commerce in St. Louis then f warded said check to the Merchants Exchange National Bank of t City of New York for collection, and that said Mechants Exchan National Bank collected the same from said American Exchange N tional Bank of the City of New York on or about the 19th day October, 1904."

These facts were admitted subject to their relevancy and com tency. Blees died in Sept. 1906, without further payments than t four mentioned, the last of which was taken our of the loan. Th last payment kept the insurance in force until Sept. 29th, 190 at which time a fifth installment was due, as well as the loan $9,550.00. Neither the fifth installment of premium was paid, n was the loan paid or otherwise cared for by either Blees or his wi She says that she had no notice of the failure of the husband to p his premium on the 29th of Sept. 1905, nor of the intention of t company to cancel the policy and apply the surplus to the payme of the loan. It will be noted that a part of the loan was paid to t parties in cash, and of this point is made. But the point so ma is largely determined by the determination of the loan agreeme Plaintiff contends that this loan agreement is a Missouri contra and can not effect the extended insurance provided for by our statu R. S. 1909, sec. 7897. It is true that three-fourths of the net val of this policy on Sept. 29th, 1905, the time when default was mad would have been more than enough to carry temporary insuran for the full amount of the policy to the date of the death of Ble provided the company was not allowed to deduct from such thr fourths of the net value, the cash payment made to Blees and wi Such was the result of our ruling in this case, 269 M. 509, wh here on the first appeal. We then ruled that the provisions of s 7897, must be read into the policy as fully as if they had been wr ten therein. But we did not discuss the effect of the loan agr

ment, for the reason that it was not really an issue on the then record. However the decision in the Head case, and others by the U. S. Supreme Court, forces a further review of that question here, for upon it largely depends this litigation. For such discussion, we should and must have in view our statute R. S. 1899, sec. 7897, the material portions of which read:

"No policies of insurance on life hereafter issued by any life insurance company authorized to do business in this state, * * * shall, after payment upon it of three annual payments, be forfeited or become void, by reason of non-payment of premiums thereof, but shall be subject to the following rules of commutation, to wit: The net value of the policy, when the premium becomes due, and is not paid, shall be computed. * * * and after deducting from three-fourths of such net value, any notes or other evidence of indebtedness to the company, given on account of past premium payments on said policies, issued to the insured, which indebtedness shall be then canceled, the balance shall be taken as a net single premium for temporary insurance for the full amount written in the policy; * * *

The clear purpose of this statute is apparent. It allows the insured to borrow from the company money with which to pay his premiums, but if the insured borrows more, then such additional sum can not be deducted from the three-fourths net value, in determining the question of extended insurance. Upon the first appeal of this case, we held, and we think rightfully held, that this statute (if valid under the facts here in issue) was a part of the contract of insurance, as much so as if fully written out therein. But if the statutte is invalid, as depriving a party from making an independent contract in another state, then that much of the contract is stricken out. It becomes a part of the contract, because of being a state statute in the forum where the contract was made. So with these additional facts before us we take up next the real vital question of this case i. e. the loan contract, its character, and its effect upon the issues made.

II.

As to the loan agreement it is urged that it is a Missouri contract, and in it must be read our statute, sec. 7897, R. S. 1899. To so do would change the entire terms of the contract. But this question was gone into fully in Liebing vs. Mutual Life Insurance Company, 207 S. W. 230. We there ruled that the loan agreement was a New York contract. I was absent and am not marked in that opinion, but as a dissenter in Head vs. Ins. Co. 241 M. l. c. 408, my views on the case could well have been surmised. Upon the question of the loan contract being a New York contract, I now lend my concurrence to the views of our late Brother Bond, in the opinion in 207 S. W. 230, et seq. The facts in the present record are not such as to change the situation from what it was when that ruling was made. So that we rule that the loan agreement was a New York contract,

and for the reasons assigned in our opinion in this case upon the se
ond appeal—207 S. W. p. 230.

III.

But it is urged that we ruled in the first appeal that there was su
ficient evidence to carry this case to the jury, and that such becam
the law of the case. We did so rule, but we did it upon the recor
then before us, and only on the points involved therein. In such
case we had the right upon second appeal to correct our ruling, an
make it conform to the law, as we then found it. There has been
federal question in this case from start to finish, as there was in th
Head case, supra. Whilst we have announced that the opinion
this court is the law of the case upon second trial, we have also r
served the right to change our views upon second appeal. Mangol
vs. Bacon, 237 M. l. c. 512 et seq. Especially is this true in a ca
like this where there was a continuous shifting of some issues upo
each trial.

IV.

The effect of our statute upon a New York contract has be
fully discussed by the U. S. Supreme Court in the recent ca
of New York Life Insurance Co. vs. Dodge, 246 U. S. 357. This
a Missouri case, the writ of error having issued to our Springfie
Court of Appeals. It involved a loan contract such as was involv
in the Head case, supra, and in legal effect the same as is involv
here. As in this case the makers of the loan agreement were re
dents of Missouri, and the policy was, as in this case, a Missouri co
tract. The Springfield Court of Appeals permitted a recovery up
the policy, although it had been cancelled under the terms of t
loan agreement. They relied upon our rulings in Burridge vs. I
surance Co. 211 M. 158 and Smith vs. Mutual Ben. Life Ins. C
173 M. 329. Under those cases, as well as under Head's case, supr
the Court of Appeals was right in its conclusions of law. In Bu
ridge's case we ruled that the loan agreement was not an independe
contract, but that it was within the terms of the insurance contra
which was a Missouri contract, and in it was read our statute s
7897, supra. We then said: 211 M. 1 c. 174:

"The loan and pledge contract in the case at bar is in no fair sen
a contract distinct and independent from the policy. To the co
trary, such loan and pledge was contemplated by the policy itse
It involved the policy, it may be likened unto an egg laid in t
policy and subsequently hatched—i. e., was made in pursuance of
terms."

So that the Supreme Court of the United States, in Dodge's ca
had all the learning of this court, as well as our learned borthers
the Springfield Court of Appeals, before it. This for the reas
that Burridge's case reviews our previous cases. Of this ruling
the Springfield Court of Appeals, the U. S. Supreme Court said:

"That the policy when issued to Dodge became a Missouri contract, subject to its statutes, so far as valid and applicable, is undisputed and clear. The controlling doctrine in that regard was announced and applied in Equitable Life Assurance Society v. Clements, 140 U. S. 226; New York Life Ins. Co. v. Cravens, 178 U. S. 389; and Northwestern Life Insurance Co. v. Riggs, 203 U. S. 243. In each of those cases the controversy related to the interpretation and effect of an original policy—not a later good faith agreement between the parties. We held that to the extent there stated the state had power to control insurance contracts made within its borders. With those conclusions we are now entirely content; but they do not rule the question presently presented. Here the controversy concerns effect of the state statute upon agreements between the parties made long after date of the policy and action taken thereunder; their essential fairness and accordance with New York laws are not challenged.

Considering the circumstances recited above, we think competent parties consummated the loan contract now relied upon in New York where it was to be performed. And, moreover, that it is one of the kind which ordinarily no state by direct action may prohibit a citizen within her borders from making outside of them. It should be noted that the clause in the policy providing "cash loans can be obtained by the insured on the sole security of this policy on demand, etc.," certainly imposed no obligation upon the company to make such a loan if the Missouri statute applied and inhibited valid hypothecation of the reserve as security therefor as defendant in error maintains. She cannot, therefore, claim anything upon the theory that the loan contract actually consummated was one which the company had legally obligated itself to make upon demand.

In Allgeyer v. Louisiana, 165 U. S. 578, we held a Louisiana statute invalid which undertook to restrict the right of a citizen while within that state to place insurance upon property located there by contract made and to be performed beyond its borders. We said "the mere fact that a citizen may be within the limits of a particular state does not prevent his making a contract outside its limits while he himself remains within it", and ruled the under the Fourteenth Amendment the right to contract outside for insurance on property within a state is one which cannot be taken away by state legislation. So to contract is a part of the liberty guaranteed to every citizen. The doctrine of this case has been often reaffirmed and must be accepted as established. Nutting v. Mass., 183 U. S. 553, 557; Delmater v. South Dakota, 205 U. S. 93, 102; Provident Savings Assn. v. Kentucky, 239 U. S. 103, 114; Adams v. Tanner, 244, U. S. 590, 595.

The Court below rests its judgment denying full effect to the loan agreement upon Smith v. Mut. Ben. Life Ins. Co., supra, and Burridge v. Insurance Co., supra. In them the Supreme Court distinctly held Section 7897 controlling and the insurer liable upon policies actually issued in Missouri notwithstanding any subsequent stipulation directing different disposition of reserve after default.

In the latter it expressly approved the doctrine of the first and among other things (p. 171) said:

"Attending to that section (No. 7897) as it read when the policy issued and when the insured died, it will be observed that the net value of the policy is to be computed. Then from three-fourths of such net value there is to be taken away—what? All indebtedness? Not at all. There shall be taken away 'any notes or other evidence of indebtedness to the company, given on account of past premium payments on said policies.' The residue, if any, then goes automatically to the purchase of temporary or extended insurance. * * * In that (the Smith) case, therefore, the scope and meaning of that clause of our nonforfeiting insurance statute was held in judgment in the stiffest sense and this Court decided that the statute was mandatory; that the character of the indebtedness to be deducted from the net value before applying the residue to the purchase of temporary or estended insurance must be looked to and was limited by the clear words of the statute 'to notes or other evidence of indebtedness to the company, given on account of past premium payments' on the policy issued to the insured; and did not include notes and evidences of indebtedness arising in other ways. It is not apparent, assuming the statute be constitutional, how, giving heed to the hornbook maxim, expressio unius, etc., any other conclusion could have been arrived at in reason. It was held furthermore, in effect, that such provisions of law evidenced a sound and just governmental policy, and wrote into every policy of life insurance, coming within its purview, a mandate not to be abrogated in whole, or hedged about or hopped off in detail, by policy provisions, nor to be contracted away otherwise than as prescribed by statute."

Treating the loan to Dodge as made under a New York agreement which Missouri lacked power directly to control, the question presented becomes similar in principle to the one decided in New York Life Insurance Co. v. Head, 234 U. S. 149. There suit was instituted in Missouri upon a policy personally applied for and received while in that state by a citizen of New Mexico none years afterwards, having duly acquired the policy — New Mexico, the transferee wrote from there to the insurer in New York and effected a loan under an agreement like the one now before us. The State court held the policy a Missouri contract and the loan agreement controlled by its non-forfeiture statute.

Assuming the policy to be a Missouri contract, we declared that state without power to extend its authority over citizens of New Mexico and into New York and forbid the latter agreement there made simply because it modified the first one. We said:

"It will be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that state and in the State of New York and there destroy freedom of contract without throwing down the constitutional barrier by which all the states are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends."

The reasoning advanced by the Missouri Supreme Court to support its ruling was thus summarized:

"As foreign insurance companies have no right to come into the state and there do business except as the result of a license from the state and as the state exacts as a condition of a license that all foreign insurance companies shall be subject to the laws of the state as if they were domestic corporations, it follows that the limitations of the state law resting upon domestic corporations also rest upon foreign companies and therefore deprive them of any power which a domestic company could not enjoy, thus rendering void or inoperative and provision of their character or condition in policies issued by them or contracts made by them inconsistent with the Missouri law."

And this argument we declared unsound since the "Proposition can not be maintained without holding that because a state has power to license a foreign insurance company to do business within its orders and the authority to regulate such business, therefore a state has power to regulate the business of such company outside its borders and which would otherwise be beyond the state's authority—a distinction which brings the contention right back to the primordial conception upon which alone it would be possible to sanction the doctrine contended for, that is, that because a state has power to regulate its domestic concerns, therefore it has the right to control the domestic concerns of other states."

Under the laws of New York, where the parties made the loan agreement now before us, it was valid; also it was one which the Missouri Legislature could not destroy or prevent a citizen within its borders from making beyond them by direct inhibition; and applying the principles accepted and enforced in Insurance Company v. Head, we think the necessary conclusion is that such a contract could not be indirectly brought into subjection to statutes of the state and rendered ineffective through a license authorizing the insurance company there to do business. As construed and applied by the Springfield Court of Appeals, section 7897 transcends the power of the State. To hold otherwise would permit destruction of the right-often of great value-freely to borrow money upon a policy from the issuing company at its home office and would, moreover, sanction the impairment of that liberty of contract guaranteed to all by the Fourteenth Amendment."

From this it appears that the U. S. Supreme Court had in full view all our rulings, and at one fell swoop has overturned all of them, by holding that our statute sec. 7897, supra violates, the Federal constitution, in so far as it applies to contracts made by citizens of this state with a corporation in another state. Their language is too plain for misunderstanding, and we were right in our ruling upon the second appeal of this instant case. 207 S. W. 230.

V.

The loan agreement being an independent New York contract, as ruled by this court upon the second appeal (207 S. W. 230), and

as previously ruled by the U. S. Supreme Court in the Head and Dodge cases, supra, there is but little left in this case, notwithstanding the voluminous reply (outlined supra) of the plaintiff. The Federal court rules that our statute in force at the issuance of this policy (sec. 7897, supra) is violative of the Federal Constitution, in so far as it limits the right to make this independent New York contract, if the statute be given such construction. In 1903 the statute was amended to cover this point. Burridge vs. Ins. Co. 211 M. 158. But we have well ruled both in that case, and in this case upon first appeal (269 M. 509) that the amendment of the statute could not effect insurance contracts issued prior thereto. This however is adrift, because, if as the Federal Court holds, the parties make the loan contracts as independent contracts in a state other than Missouri the contract is the controlling thing thereafter. The real point is that the Missouri statute can not and does not control a contract made in another state. By the terms of this loan contract the life insurance contract "to-gether with any and all money which may be or become payable under the same" was conditionally pledged to the defendant in this case. The policy was sent to New York the fixed place of the performance of the contract. The conditions of the pledge were broken by the plaintiff and her husband. She was a party to the pledge and therefore had full notice of its conditions. Not only so but by this agreement the surrender value of the policy was agreed upon and fixed by the parties themselves. But even if there had been a surrender value in excess of the loan at the time the company exercised its rights under the contract to cancel the policy, the agreement provides that "the balance, (of the surrender value) if any to be payable to the parties entitled thereon demand." So that the loan agreement, when fairly read, means that when the pledgee of the policy exercised its right to cancel the policy, and settle for the amount due upon the policy, the policy thereafter was a dead instrument, and the sole remaining rights thereafter were the rights, if any, growing our of the loan agreement. It can not well be said that the parties to an insurance contract can not make a valid agreement as to a cancellation of the insurance contract, and a settlement of the matters between the. This loan agreement, under the rulings, supra is such a contract. So that if the act of the corporation in cancelling the policy was had in pursuance of the terms of the loan agreement, and not otherwise in violation of law, the policy was a dead instrument at the institution of this suit.

VI.

It is urged that the defendant should be precluded from the benefits to be derived from the pleadings of the New York statutes, as law because, as agreed by plaintiff's learned counsel, they were plead prior to the first appeal in this case. Without adding length to this opinion, it should be said that upon the first hearing here (269 M. 509) upon plaintiff's appeal, we did not reverse and remand the cause with any specific directions. It is altogether

ferent from the case of McClure vs. Bank, 263 M. 128. There we reversed with specific directions to try a certain issue. We have no such case here. What we then said, as to the future trial of the case, was nothing more than a general direction, 269 M. l. c. 525. Not only so but the plaintiff so construed it, and availed herself of the privilege of filing two amended petitions, before the issues were made up for the second trial, nisi. It is conceded that in the answer to these petitons, the New York statutes and law were duly pleaded. Whether they were pleaded in the first answer, we need not stop to consider. But when we reverse a judgment and remand a cause to be retired in harmony with our views, as was done here, we do not mean that the pleadings may not be amended and new issues made. Both parties in this case acted upon this view of the law, and both parties filed new pleadings before the second trial, nisi.

There is no question about the fact, that when this court gives specific directions to a trial court (as we did in McClure vs. Bank, supra) such trial court must carry out our directions, and such court is not authorized to obviate our directions by allowing amendments which would allow the trial of issues in addition to the ones we have directed to be tried. But that case, and others of like character, is not this case. There is no substance in this contention of the plaintiff.

VII.

The trial of a lawsuit should have in view the final attainment of justice, under the existing law. If defendant did not push the conclusiveness of its loan agreement under the New York law at the first trial, its conduct was evidently superinduced by the opinions of this court, which opinions in the mean time had been destroyed, root and branch, by the ruling of the U. S. Supreme Court. To say, that under such circumstances, (and in the further view of the fact that under our general directions as to a future trial, the plaintiff had amended her pleadings) the defendant could not invoke in answer to such amended pleadings of the plaintiff, this clear defense given to it by the highest exponent of the law, would be to stick in the bark of extreme technicality, rather than tread the highway of even-handed justice under existing law. We do not feel constrained to take that narrow view of the matter, and thus disturb the usual discretion of a trial court in permitting amendments of the pleadings. Nor is there substance in the charge that the constitutional question should have been urged before it was argued in the answer to plaintiff's amended petition on the second hearing. When we reversed the case the first time (under a general direction) the case was for trial nisi, de novo. Amendments to pleadings were proper and permissible. The constitutional question was duly lodged in the answer, which is the first place it could be raised. If in fact it is a constitutional question. The real constitutional question appears when it is held that we should read our statute into a New York contract. The urging of the question here, under the facts before us, is but the grasping for a straw.

What we have ruled in the various points above covers (not in tail, because to go into detail would cover a volume) all the s stantial points made by respondent.

VIII.

When here on second appeal (207 S. W. l. c. 232) we thus c cluded our opinion:

"It necessarily follows that conformity to the ruling in that c requires the judgment in the instant case to be reversed and cause remanded for the error of the trial court in excluding proof of the New York Laws.

On a new trial an opportunity will be afforded to determine issue as to whether or not the defendant complied strictly with terms of the loan agreement and conformed strictly to the laws New York in the cancellation of the policy and the extinguishm of the loan indebtedness."

Upon the trial out of which this appeal grows, the trial co again refused to admit the laws of New York. This refusal in open defiance of our ruling. We had ruled, as we rule n that the loan agreement was a New York contract, to be constru by New York laws. Whilst this court had ruled otherwise, this court bowed in submission to the higher authority, and trial court should have done likewise. Unless the Federal co changes its ruling, there is nothing to be gained by the prolongati of this litigation. Under such ruling the contract of loan is New York contract, to be construed by the New York law. trust that there will be no further defiance of our judgment, wh we again repeat, that the laws of New York (where pleaded) te ing to show that defendant did not violate them in the cancel tion of the insurance contract under the terms of the loan agr ment, were competent evidence in this case. And further that sent any specific law to the contrary, the terms of the loan contr are sufficient to authorize the cancellation of the insurance c tract.

The judgment is reversed and the cause remanded, to the e that the trial court, in view of what we have said, may be able clear this case of much of the trash contained in the pleadings, a finally direct its jury upon the real live issues in the case. Jud ment reversed and cause remanded. Walker C. J. and Williams concur in these views.

(Signed) W. W. GRAVES, *J.*

And thereafter, and on the 15th day of December, 1920, the was filed Respondent's Remittitur in said cause, which said remitt tur is in the words and figures following, to-wit:

In the Supreme Court of Missouri, en Banc, October Term, 1920.

Number 21639.

MARY S. LIEBING, Respondent,

v.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Appellant.

Respondent's Remittitur.

Now comes Mary S. Liebing, respondent in the above-entitled cause, and pursuant to the majority opinion herein remits to the said Mutual Life Insurance Company of New York, appellant herein, the damages and attorney's fees included in the verdict and judgment herein, together with interest thereon from the 14th day of May, 1919. And respondent believes that the amount of damages allowed by the jury is Five Thousand Dollars and the amount of attorney's fees is Ten Thousand Dollars, making a total of Fifteen Thousand Dollars (Abs. 398).

Respectfully submitted,

JAMES J. O'DONOHOE,
Attorney for Respondent.

And thereafter, on the same day, to-wit, the 15th day of December, 1920, the following further proceedings were had and entered of record in said cause, to-wit:

In the Supreme Court of Missouri, in Banc.

21639.

MARY S. LIEBING, Respondent,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Appellant.

Now at this day comes the said respondent, by attorney, and hereby enters a remittitur herein in the sum of fifteen thousand dollars ($15,000.00), being the amount of damages and attorney's fees included in the verdict and judgment herein, and part and parcel of said judgment entered in this cause in the Circuit Court of the City of St. Louis, in compliance with the order heretofore made by this Court on the 13th day of December, 1920. It is therefore considered and adjudged by the Court that the judgment aforesaid, in form aforesaid, by the said Circuit Court of the City of St. Louis rendered on the 14th say of May, 1919, be in all things affirmed, and stand in full force and effect, for the sum of ninety-two thousand five hundred and forty-two and 9/100 dollars ($92,542.09), with interest thereon from the 14th day of May, 1919, at the rate

of six per cent per annum; and that the said appellant recover against the said respondent its costs and charges herein expended and have therefor execution.

In the Supreme Court of the State of Missouri.

#21639.

MARY S. LIEBING, Respondent,

vs.

MUTUAL LIFE INSURANCE CO. OF NEW YORK, a Corporation, Appellant.

Petition for Writ of Error.

To the Honorable the Chief Justice of the Supreme Court of the State of Missouri:

Mutual Life Insurance Company of New York, a Corporation Appellant in this Court in the above titled cause, shows by *his* petition to this Honorable Court that in the records, proceedings and decision of the Supreme Court of the State of Missouri, the same being the highest Court of the State in which a decision could be had in this suit, a manifest error has occurred greatly to the damage of said Mutual Life Insurance Company of New York.

That as appears in the record and proceeding, there was drawn in question the constitutionality of Section 7897 Revised Statutes of Missouri 1899, as that Section was applied and judicially construed by said Court, under Section 1 of Article 14 of the amendments to the Constitution of the United States, and that said Mutual Life Insurance Company of New York was by said Statute, as construed and applied by the Supreme Court of Missouri, deprived of its property and liberty of contract without due process of Law in violation of said amendment, all of which fully appears in the records and proceedings of the case and is specifically set forth in the assignment of errors filed herewith.

Wherefore, petitioner prays that a writ of error be allowed and that a transcript of the record, proceedings and papers upon which said order and judgment was rendered duly authenticated, be ordered sent to the Supreme Court of the United States at Washington, D. C. under the rules of such Court in such cases made and provided and that the same may be by that Honorable Court inspected and corrected in accordance with Law and justice.

FORDYCE, HOLLIDAY & WHITE,
Solicitors for Petitioner.

Allowed:
R. F. WALKER,
Chief Justice, Supreme Court, State of Missouri.

[Endorsed:] In the Supreme Court of the State of Missouri. Mary S. Liebing, respondent, vs. Mutual Life Insurance Co. of New York, a corporation, appellant. Petition for writ of error to the Supreme Court of the State of Missouri. Fordyce, Holliday & White, attorneys and counselors, 506 Olive Street, St. Louis, Mo.

No. 21,639.

MARY S. LIEBING, Respondent,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Appellant.

Order Allowing Writ of Error.

The petition of the Mutual Life Insurance Company of New York, appellant, for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Missouri, together with an assignment of errors, citation, and bond for the prosecution of said writ of error, having been presented to the undersigned Chief Justice of the Supreme Court of Missouri; and upon examination and consideration of the said petition and of the record in said cause, the said writ of error is hereby allowed, the said citation ordered issued, and the said bond in the sum of $150,000.00, with the Mutual Life Insurance Company of New York as principal, and United States Fidelity & Guaranty Company as surety thereon, approved, this 29th day of December, 1920.

R. F. WALKER,
Chief Justice of the Supreme Court of the State of Missouri.

In the Supreme Court of the State of Missouri.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Plaintiff in Error,

v.

MARY S. LIEBING, Defendant in Error.

Assignment of Errors.

Now comes the plaintiff in error in the above entitled cause and files the following assignment of errors upon which it will rely in its prosecution of the writ of error in the above entitled cause from the judgment made by this Honorable Court on the 13th day of December, 1920:

I.

The judgment of the Supreme Court of Missouri deprives the plaintiff in error of its property without due process of law contrary to

Section 1 of the 14th Amendment to the Constitution of the United States, for the reason that the statutes of the State of Missouri, Section 7897 of the Revised Statutes of Missouri 1899 and the course of judicial construction thereof by the courts of Missouri deprive the plaintiff in error of its liberty of contract and of its property without due process of law, in violation of Section 1 of Article 14 of the Amendments to the Constitution of the United States.

II.

The judgment of the Supreme Court of the State of Missouri deprives plaintiff in error of its liberty of contract and property in violation of Section 1 of Article 14 of the Amendments to the Constitution of the United States for the reason that the Statutes of the State of Missouri, Section 7897 of the Revised Statutes of Missouri 1899, as judicially construed by said Court, authorize the recovery of a judgment upon a policy of insurance issued in the State of Missouri, although such policy prior to the death of the insured has been cancelled by a valid contract entered into between plaintiff in error and defendant in error and insured in New York, to be performed in New York and governed by the laws of New York.

III.

Section 7897 of the Revised Statutes of Missouri 1899 as construed to apply by the Supreme Court of the State of Missouri in this case is unconstitutional and void because it denies to the plaintiff in error the equal protection of the law, because it deprives the plaintiff in error of its liberty of contract without due process of law and because it deprives the plaintiff in error of its property without due process of law, as guaranteed to it by Section 1 of the 14th Amendment to the Constitution of the United States.

IV.

The Supreme Court of the State of Missouri erred in holding and deciding that Section 7897 Revised Statutes of Missouri 1899 as interpreted to apply in this case was valid and not repugnant to Section 1 of the 14th Amendment to the Constitution of the United States.

V.

The Supreme Court of Missouri erred in refusing to hold that the Court below erred in failing to admit in evidence in this case the laws of the State of New York offered by plaintiff in error and thereby denying to the plaintiff in error the benefit of said laws of the State of New York and refusing to give full faith and credit to the public acts, records and judicial proceedings of the State of New York, in violation of Section 1 of Article 4 of the Constitution of the United States and denied to the plaintiff in error the equal protection of the

laws and deprived the plaintiff in error of its liberty of contract and of its property without due process of law in violation of Section 1 of the 14th Amendment to the Constitution of the United States.

VI.

The Supreme Court of Missouri erred in refusing to hold that plaintiff in error was entitled to the benefit of the amendment to Section 7897 of the Revised Statutes of Missouri 1899, which said amendment was mad by the Act of the Legislature of Missouri at its session in 1903 and may be found in the Session Acts of Missouri 1903 at Page 208, and thereby denied to the plaintiff in error the equal protection of the laws and deprived the plaintiff in error of its liberty and of its property without due process of law in violation of Section 1 of Article 14 of the Amendments to the Constitution of the United States.

Wherefore, plaintiff in error prays that the judgment herein be corrected according to law and a proper judgment entered.

S. W. FORDYCE,
JOHN H. HOLLIDAY,
THOMAS W. WHITE,
W. H. WOODWARD,
Attorneys for Plaintiff in Error.

FREDERICK L. ALLEN,
Of Counsel.

[Endorsed:] The Supreme Court of the State of Missouri. Mary S. Liebing, defendant in error, vs. Mutual Life Insurance Company of New York, plaintiff in error. Assignment of errors. To the Supreme Court of the State of Missouri. Fordyce, Holliday & White, attorneys and counselors, 506 Olive street, St. Louis, Mo.

In the Supreme Court of the State of Missouri.

#21639.

MARY S. LIEBING, Respondent,

vs.

MUTUAL LIFE INSURANCE CO. OF NEW YORK, a Corporation, Appellant.

Know all men by these presents that we, Mutual Life Insurance Company of New York, a Corporation organized under the Laws of the State of New York, as principal, and United States Fidelity & Guaranty Company, a Corporation organized under the Laws of the State of Maryland as surety, are held and firmly bound to the above named Mary S. Liebing in the sum of $150,000 to be paid to Mary S. Liebing for the payment of which well and truly to be made

we bind ourselves and each of us and each of our successors a assigns, jointly and severally, firmly by these presents.

In witness whereof we have caused this instrument to be execu this 28th day of December, 1920.

Whereas, the above named Mutual Life Insurance Company New York has prosecuted a writ of error to the Supreme Court of United States to reverse the judgment rendered in the above entitl cause by the Supreme Court of the State of Missouri: Now, the fore, the condition of this obligation is such, that if the above nam Mutual Life Insurance Company of New York shall prosecute s writ of error to effect and answer all damages and costs, if it fail make said writ of error good then this obligation shall be void, oth wise the same shall be and remain in full force and virtue.

MUTUAL LIFE INSURANCE CO. OF NEW YORK,
By JOHN H. HOLLIDAY, [SEAL.]
Attorney & Agent.
UNITED STATES FIDELITY & GUARANTY CO.,
By E. R. NIEHAUS, [SEAL.]
Attorney in Fact.

Bond approved as to form and surety and to act as supersed
R. F. WALKER,
Chief Justice, Supreme Court, State of Missouri.

UNITED STATES OF AMERICA, *ss:*

To Mary S. Liebing, or James J. O'Donohoe, her Attorney of Re Greeting:

You are hereby cited and admonished to be and appear at Supreme Court of the United States at the City of Washington in District of Columbia within thirty days from the date hereof, p suant to a writ of error filed in the Clerk's office of the Supreme C of the State of Missouri, wherein the Mutual Life Insurance C pany of New York is plaintiff in error and you are defendan error, to show cause, if any there be, why the judgment rend against the said plaintiff in error, as in said writ of error mentio should not be corrected, and why speedy justice should — be d to the parties in that behalf.

Witness, the Honorable Robert F. Walker, Chief Justice of Supreme Court, State of Missouri this 29th day of December in Year of Our Lord, one thousand nine hundred and twenty.

R. F. WALKER,
Chief Justice, Supreme Court, State of Missour

Service of above citation is acknowledged this 30th day of Dec ber, 1920.

JAMES J. O'DONOHOE,
Attorney for Defendant in Erro

[Endorsed:] In the Supreme Court of the State of Missouri. Mutual Life Insurance Company of New York, Plaintiff in Error, vs. Mary S. Liebing, Defendant in Error. Citation on writ of error. Filed Dec. 31, 1920. J. D. Allen, Clerk Supreme Court. Fordyce, Holliday & White, Attorneys and Counselors, 506 Olive Street, St. Louis, Mo.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Justices of the Supreme Court of the State of Missouri, Greeting:

Because in the record and proceedings, as also in rendition of the judgment of a plea, which is in the said Supreme Court of the State of Missouri, before you, or some of you, being the highest Court of Law or Equity of the said State in which a decision could be had in the said suit between Mary S. Liebing and Mutual Life Insurance Company of New York, there was drawn in question the constitutionality of Section 7897, Revised Statutes of Missouri 1899 under Section 1, Article 14 of the Amendments to the Constitution of the United States, and the decision was in favor of the Constitutionality and validity of such statute, and,

Whereas, a manifest error hath happened to the great damage of the said Mutual Life Insurance Company of New York as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 28th day of January, 1921, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, The Honorable Edward D. White, Chief Justice of the said Supreme Court this 29th day of December of the Year of Our Lord, one thousand nine hundred and twenty.

[Seal of the United States District Court of Missouri, Central Division, Western District.]

EDWIN R. DURHAM,
Cerk of the District Court of the United States, Central Division of the Western District of Missouri,
By H. C. GEISBERG,
Deputy.

Allowed by:
R. F. WALKER,
Chief Justice, Supreme Court, State of Missouri.

In the Supreme Court of the State of Missouri.

#21639.

MARY S. LIEBING, Defendant in Error,

vs.

MUTUAL LIFE INSURANCE CO. OF NEW YORK, a Corporation, Plaintiff in Error.

Præcipe.

The Clerk will include the following in preparing record up writ of error to the Supreme Court of the United States.

1. The complete abstract of record as filed in the Supreme Cou of Missouri.

2. All record entries in the Supreme Court of Missouri.

3. Copy of Opinion and Judgment.

4. Remittitur filed by Mary S. Liebing.

5. Judgment entered subsequent to remittitur.

6. Petition for writ of error and order of allowance.

7. Assignment of errors.

8. Bond on writ of error and order of approval with supersedeas

9. Citation and return of service thereon.

10. Writ of error showing return with the usual certificates.

FORDYCE, HOLLIDAY & WHITE,
Solicitors for Mutual Life Insurance Company of New York

[Endorsed:] In the Supreme Court of the State of Misso Mary S. Liebing, Defendant in Error, vs. Mutual Life Insurance of New York, a Corporation, Plaintiff in Error. Præcipe. Ford Holliday & White, Attorneys and Counselors, 506 Olive Street, Louis, Mo.

STATE OF MISSOURI, *Set.:*

I, J. D. Allen, Clerk of the Supreme Court of the State of Misso in obedience to the mandate of the within writ of error, and as rected by the præcipe for preparation of transcript, herewith tra mit to the Honorable Supreme Court of the United States a full, t and complete transcript of the record and proceedings in the ca of Mary S. Liebing, Respondent, vs. The Mutual Life Insura

Company of New York, Appellant, No. 21639, as fully as the same appears of record and on file in my office, to which said transcript is attached and made a part thereof, said appellant's petition for *for* writ of error, order allowing writ of error, assignment of errors, copy of bond for prosecution of writ of error, citation and return of service thereof, writ of error, and said præcipe.

In testimony whereof, I hereunto set my hand and affix the seal of said Supreme Court, at my office in the City of Jefferson, State aforesaid, this 15th day of January, 1921.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN,
Clerk of the Supreme Court of the State of Missouri.

FILED
APR 21 1922
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1921: No. 215.

THE MUTUAL LIFE INSURANCE CO. OF NEW YORK,
Plaintiff-in-Error,

vs.

MARY S. LIEBING,
Defendant-in-Error.

In Error to the Supreme Court of the State of Missouri.

BRIEF FOR THE MUTUAL LIFE INSURANCE CO. OF NEW YORK.

New York Life v. *Dodge,* 246 U. S. 357, is controlling. A Missouri statute can not compel a life insurance policy to be converted, on lapse, into extended insurance, when the parties by lawful contract in New York have applied its full value to a cash loan.

FREDERICK L. ALLEN,
JOHN H. HOLLIDAY,
FREDERIC D. McKENNEY,
WM. MARSHALL BULLITT,
Counsel for Plaintiff-in-Error.

Printed in the United States by The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

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vs.

MARY S. LIEBING,
Defendant-in-error.

In error to the Supreme Court of the State of Missouri.

BRIEF FOR THE MUTUAL LIFE INSURANCE CO. OF NEW YORK.

This $92,542.09 judgment must be reversed on the authority of *New York Life Ins. Co.* vs. *Dodge,* 246 U. S. 357,,as it presents the very question there involved, under circumstances so nearly identical as to afford no room for differentiation.

The Supreme Court of Missouri, in its opinion below, very frankly narrows the issue to that one point, saying (R. 252):

> "There are many propositions presented and discussed in briefs by counsel for each party, but from the view we take of the case *only one of them is worthy of consideration* and that is: Is the *Dodge* case controlling in this one? We so held in the case of *Liebing* vs. *Ins. Co.,* 276 Mo. 118, but upon reconsideration of that case we are of the opinion that the contention there announced was *erroneous* and should *not* be adhered to."

On the other hand, we think the *former* opinion was the correct one and that the opinion now appealed from is the *erroneous* one.

Seven years after a life insurance policy lapsed, and had (without protest from the insured or the beneficiary) been cancelled in strict compliance with the laws of New York and with a LOAN AGREEMENT made in New York thereunder, this suit was brought in 1912, to secure an unconscionable advantage in the shape of $65,250 extended insurance under the very Missouri non-forfeiture Statute (§ 7897) which later [1918] this Court held to be void in the *Dodge* (246 U. S. 357) and *Head* (234 U. S. 149) cases.

The precise question here presented is whether that same Missouri non-forfeiture statute (which provides that in case of lapse, the reserve on a life policy shall be applied to the purchase of extended insurance) can constitutionally prevail against, and prohibit, parties from subsequently contracting, in good faith, in New York, upon an equivalent consideration for a different disposition of that reserve.

There is absolutely no dispute as to the facts.

STATEMENT OF THE CASE.

1. *The policy sued on was a Missouri contract.* On September 29, 1901, one Blees, a resident of Macon, Missouri, signed a written application for a $50,000* life insurance policy, and delivered the application to Payson, a local soliciting agent of the Mutual Life,

*Payable in 50 $1,000 20-year 5% gold bonds; or, commutable at beneficiary's option, for $62,250 cash.

who sent it (as he did all applications) to the Mutual Life's St. Louis agency, which, in turn, sent it to the Home Office in New York (R. 2, 15, 53, 54, 76, 77).

The Home Office approved the application, issued and mailed the policy to its St. Louis agency, which sent it to Payson, who delivered it in Macon to Blees, who accepted its delivery (thereby consummating the contract in Missouri) and paid to Payson the initial premium (R. 12, 15, 53, 77). It was a Missouri contract (p. 21, *infra*, note).

On September 29, 1902 and 1903, respectively, Blees paid the 2d and 3d annual premiums to Payson at Macon (R. 5, 53, 54, 59).

2. *The assignment to Mrs. Blees.* On March 2, 1904, Blees executed and delivered, in Macon, an assignment of the policy to Mrs. Blees (R. 4, 5, 58, 77, 78).

3. *Execution of the Loan Agreement of October 12, 1904.* The 4th annual premium due September 29, 1904, was not paid when due (R. 55), but, within the 30 days grace allowed by the policy (R. 40), to wit: on or about October 7, 1904, Mrs. Blees and Mr. Blees jointly signed in Macon, a proposed LOAN AGREEMENT for $9,550, dated October 12, 1904,* and delivered it, together with the $50,000 policy, to Payson, who on the same day forwarded both documents to Mr. Cheney, Manager of the Mutual Life's St. Louis

*Or, rather left the date blank, which was filled in at New York by the Mutual Life on October 12, when it determined to accept the application and to make the loan requested.

office, who sent them on to the Home Office in New York for action thereon, where they were received together on October 10, 1904 (Stipulation, R. 87, 88; also R. 5-6, 12, 15, 61, 169; for *facsimile* see R. 156).

No one in Missouri could make, approve or accept loans for the Mutual Life (R. 172).

By the express terms of the LOAN AGREEMENT, Blees agreed to repay the loan to the Company "at its head office, Nassau, Cedar and Liberty Streets, in the City of New York on September 29, 1905" (R. 6).

The LOAN AGREEMENT was a mere *offer*, signed only by Mr. and Mrs. Blees, and could not become effective *unless and until it was accepted* by the Mutual Life in New York.

It proposed as follows:

> "The Company agrees to loan to the parties of the second part the sum of Ninety five hundred and fifty dollars, apportioned as follows:
>
> | | |
> |---|---|
> | To pay premiums on policy No. 1207072 to 29th day of September, 1905..... | $4291.50 |
> | Interest at 5% (adjusted also for interest on premiums) ..... | 468.00 |
> | Balance by Company's check..... | 4790.50 |
> | | $9550.00 |
>
> The receipt of the foregoing amount as a loan is hereby acknowledged upon the pledge as hereinafter set forth of Policy No. 1207072 in said Company. And the said parties of the second part agree to repay the said sum of $9550 to the Company at its Head Office, Nassau, Cedar and Liberty Streets, in the City of New York, on the 29 day of Sept. 1905.

IN CONSIDERATION of the amount of said loan the parties of the second part hereby assign, transfer and set over all of their right, title and interest in and to said Policy No. 1207072 issued by said Company on the life of Frederick W. V. Blees together with any and all moneys which may be or become payable under the same, to the Company as collateral security for the payment of said loan with interest, the said parties of the second part will forever warrant and defend the title of the said Company to the said Policy.

In the event of *default* in the payment of said loan on the date herein above mentioned, the Company is hereby authorized at its option, without notice and without demand for payment, *to cancel said policy, and apply the customary cash surrender consideration* then allowed by the Company for the surrender for cancellation of similar policies, namely, $9550 *to the payment of said loan with interest,* the balance, if any, to be payable to the parties entitled thereto on demand, or the Company may at its own option renew the said loan for one year or less period on the written request of any one of the parties of the second part hereto, and without further notice to any one of the parties of the second part."

4. *The loan was made in New York.* On October 12, 1904, the Mutual Life at its Home Office in *New York,* ascertained "the loan value of the policy"; verified the signatures on the LOAN AGREEMENT by comparison with the policy names; "approved" and "accepted" "the LOAN AGREEMENT, together with the pledge of the policy" and "approved the making of the loan" to Mr. and Mrs. Blees (R. 169, 170, 172).

The Home Office cashier was directed, first, to deduct from the proposed $9,550 loan (in accordance

with the explicit terms of the LOAN AGREEMENT, R. 6, 55) $4,291.50 for the 4th annual premium which had been past due and unpaid since September 29, and $468 interest in advance on the loan; next, to draw the Mutual Life's check on a New York bank for the $4,790.50 balance; and, finally, to send the check, with a receipt for the 4th premium so paid, to Mr. and Mrs. Blees (R. 170).

These directions were carried out literally; and on October 12, 1904, the Mutual Life at its *New York* Home Office made the one-year-$9,550 loan to Blees, as follows (R. 3, 7, 15, 54, 55, 88, 171, 172):

Amount of Loan.....		$9,550.00
Applied to payment of 4th annual premium due Sept. 29, 1904...$4,291.50		
Applied to pay one year's interest in advance on loan, and 14 days past due interest on the premium in default (R. 6, 40).....	468.00	4,759.50
Balance to be paid to Mr. and Mrs. Blees...		$4,790.50

On the same day a check for $4,790.50 was drawn in *New York*, by the Mutual Life, on a New York Bank, to the joint order of Mr. and Mrs. Blees, and together with a $4,291.50 signed receipt for the past due 4th annual premium, was mailed from *New York* to the company's manager in St. Louis, who forwarded the check and premium receipt to Payson, who delivered them both to Blees at Macon, Mo., on or about October 15, 1904 (R. 55, 60, 88, 89, 160, 171).

Mr. and Mrs. Blees endorsed the check (R. 61) which Mr. Blees deposited on October 18 to his credit in a St. Louis bank (R. 89, 160, 171, 218), which sent it on to New York for collection, where it was paid by the bank on which it was drawn (R. 89, 75-6, 160-1, 171, 219).

The loan thus enabled Blees to pay the 4th premium due September 29, 1904, to keep his policy in force another year, *and also to get $4,759.50 cash for outside uses* (R. 54, 55, 88, 94).

The Mutual Life at all times kept the LOAN ARGEEMENT and the $50,000 policy pledged thereunder, to secure the $9,550 loan, in its vaults in *New York* (R. 172, 175).

5. *The lapse of the policy for non-payment of the 5th premium due September 29, 1905.* The next year, the 5th annual premium became due on September 29, 1905, but it was not paid then, nor within 30 days thereafter; the policy lapsed for the nonpayment of such premium (R. 2, 3, 12, 94, 106, 107, 110, 175); and it became worthless unless it had some value under the policy (or statutory) non-forfeiture provisions.

6. *The default on September 29, 1905, under the Loan Agreement, and the subsequent cancellation of the policy.* As the $9,550 loan was not paid when due on September 29, 1905 (R. 173), the Mutual Life (after waiting several months* to see whether Blees

*On account of the vast business done in so many agencies, it took several months before the Home Office in New York knew whether a particular loan or premium had been paid.

had paid the 5th premium or intended to lapse the policy anyway) on December 4, 1905, settled the indebtedness, and *cancelled* both the policy and the LOAN AGREEMENT (R. 173-178) under the following provision of the LOAN AGREEMENT (R. 6, 156):

> "In the event of default in the payment of said *loan* on the date hereinabove mentioned, the Company is hereby authorized, at its option, *without notice* and *without demand* for payment, to *cancel* said policy, and *apply the customary cash surrender consideration* then allowed by the Company for the surrender for cancellation of similar policies, namely, $9,550, *to the payment of said loan,* with interest, the balance, if any, to be payable to the parties entitled thereto on demand or the Company may, at its own option, renew the said loan for one year or less period on the written request* of any one of the parties of the second part hereto, and without further notice to any one of the parties of the second part."

The settlement of the policy was in strict accordance with the laws of New York where the loan was made, and its cancellation was valid under the New York law (Depositions of ALLAN MCCULLOH, Gen. Counsel Equitable Life Assurance Society, R. 178-183; JAS. H. MCINTOSH, Gen. Counsel of New York Life Ins. Co., R. 183-206); and was as follows:

> The "customary cash surrender consideration then allowed by the Company for the surrender for cancellation of similar policies"

*No request was made by either Mr. or Mrs. Blees for a renewal of the loan.

(R. 6) was (R. 170, 173, 176, 177) at the end of the 4th year (Sept. 29, 1905) $191 per $1000 bond ($191 x 50) (R. 41, 43)...		$9550.00
The unpaid loan was.....	$9550.00	
5% Interest on $9550 Sept. 29, 1905 to Dec. 4, 1905.....	74.57	9624.57
Deficit		$74.57

Consequently, there was not only, no balance of value in the policy payable to Mr. or Mrs. Blees, but an *actual deficit;* the policy and LOAN AGREEMENT were cancelled (R. 156, 173-178); and there was no insurance in force when Mr. Blees died on September 8, 1906 (R. 53)—just 11 months and 10 days after the lapse (R. 2, 15).

Shortly after Mr. Blees' death, in response to an inquiry, the Mutual Life notified Mrs. Blees and her attorneys of the above facts, and that the policy had been cancelled and was of no value (R. 121-123).

Nothing more was heard of the matter for six years, when Mrs. Blees (having in the meantime married and become Mrs. Liebing) employed a new attorney, Mr. O'DONOHOE, who advanced the theory that under the old Missouri non-forfeiture law, § 7897, as construed by the Supreme Court of that State,* the company was required to apply three-fourths of the

*_Smith_ v. _Mutual Benefit_, 173 Mo. 329; _Burridge_ v. _New York Life_, 211 Mo. 158. Seven days after the Supreme Court of Missouri thus construed the statute (_Smith_ case), the Legislature amended the statute so as to overcome that construction (_Burridge_ case).

net reserve (computed by the Actuaries or Combined Experience Table of Mortality and 4% interest) *less* only any indebtedness against the policy created solely on account of *past premiums,* as a net single premium to purchase temporary extended insurance for the face ($65,250) of the policy (R. 127-129). His contention may be tabulated as follows:

Net value of policy at premium default (Sept. 29, 1905) computed by Actuaries or Combined Experience Table of Mortality and 4% interest (R. 134, 151)....		$11,230.83
¾ of such net value is (R. 134).....		$8,423.12
Deduct existing indebtedness on account of *past premium* payments only, (ignoring the $4,790.50 paid Blees in cash) (R. 134):		
Premium due Sept. 29, 1904.....$4,291.50		
5% Interest paid in advance.....	468.00	4,759.50
Amount to be applied as a single net premium to purchase extended insurance for $65,250 (R. 134).....		$3,663.62

$3,663.62 was, we concede, a great deal more than enough (as only $715.79 was required), if applied as a single net premium under § 7897, to extend the $65,250 Blees policy beyond his death on September 8, 1906 (R. 134 *et seq.*).

Consequently, if § 7897 was valid and applicable, the Mutual Life was undoubtedly liable for the entire amount of the policy, *i. e.,* $65,250, less the $9,550 indebtedness and interest.

The Mutual Life denied liability (R. 131); and this suit was filed in the State Court on December 9, 1912 (R. 1, 93).

7. History of the litigation. On the *first* trial, at the close of the plaintiff's case [May 16, 1913], the Court gave a peremptory instruction for the *defendant* (R. 104), sustaining its several pleas of the statute of limitation, failure to make proofs of death, applicability of an amendatory statute of 1903, and variance in proof; but on appeal this was reversed and those questions were foreclosed adversely to the Mutual Life (*Liebing* v. *Insurance Co.*, 269 Mo. 509).

On the *second* trial [April 30, 1917] the lower court gave a peremptory instruction, this time in favor of the *plaintiff* (R. 14), but on appeal (because during its pendency this Court had decided in *New York Life Ins. Co.* v. *Dodge*, 246 U. S. 357, 377, that § 7897 was void under the 14th Amendment), the Supreme Court of Missouri *reversed* the judgment on the authority of the *Dodge* case (R. 210-215; *Liebing* v. *Ins. Co.*, 276 Mo. 118); and held [Nov. 27, 1918] (1) that the lower court erred in excluding the evidence of McCULLOH and McINTOSH as to the New York laws and the Mutual Life's strict compliance therewith, and (2) that the LOAN AGREEMENT was a *New York* contract subject to the laws of New York and that (R. 214; 276 Mo. 135)

> "there is no point of essential distinction between the facts in judgment in this case and those presented in *N. Y. Life Ins. Co.* v. *Dodge*, 246 U. S. 357."

The Court (four judges to one) reviewed the *Head* (234 U. S. 149) and *Dodge* (246 U. S. 357) *Cases,* pointed out that those cases had disapproved the previous Missouri rulings as to the applicability of § 7897 to loan agreements, cited a number of authorities as to the law governing contracts, and aptly said (*Liebing* v. *Ins. Co.,* 276 Mo. 118, 134):

> "The question, therefore, to be ruled is whether the loan agreement and pledge of the policy in the instant case are governed by the laws of New York. This is determinable by the principles of law governing the making, the validity, the interpretation and the enforceability of contracts made under circumstances such as are shown in the record. * * *
>
> Applying the foregoing principles of law, as far as invoked by the facts in the present case, *there can be no escape from the conclusion that the loan contract and pledge of the policy were both consummated and to be performed in the State of New York.* It is evident that the loan contract did not become a binding obligation until it was delivered to the defendant (appellant) in the State of New York and *assented to and accepted by it there.* It is also apparent from the portion of the loan contract quoted above that the promisors therein (plaintiff and her husband) agreed 'to repay the said sum of $9550 to the company at its head office, Nassau, Cedar and Liberty Streets, in the City of New York on September 29, 1905.' Necessarily, therefore, *the place of performance* of the loan contract and the accompanying pledge of the property, *were fixed by the agreement itself* in the State of *New York. These facts made it a New York contract* and performable in that State, just as fully as if the parties had recited in *hæc verba* that the laws of New York should govern an agreement entered into in that State and contracted to be per-

formed in that State. The *recital* of such an agreement is the *only* difference as to the loan agreements between the case at bar and the recent decision of the Supreme Court of the United States in *N. Y. Life Ins. Co.* v. *Dodge, supra.* But inasmuch as such a recital was not necessary in the present case in view of the fact that the contract itself was not *made* until the defendant became a party to it in New York, where it was also specifically agreed it should be performed, there is no point of essential distinction between the facts in judgment in this case and those presented in *N. Y. Life Ins. Co.* v. *Dodge, supra.*

It necessarily follows that conformity to the ruling in that case requires the judgment in the instant case to be reversed and the cause remanded for the error of the trial court in excluding the proof of the New York laws.

On a new trial an opportunity will be afforded to determine the issue as to whether or not the defendant complied strictly with the terms of the loan agreement and conformed strictly to the laws of New York in the cancellation of the policy and the extinguishment of the loan indebtedness."

On the *third* trial [May 14, 1919] the lower court deliberately *refused to follow** that decision of the Appellate Court as to the admissibility of the evidence of McCULLOH and McINTOSH as to the law of New York (R. 179, 184, 190), upon the ground that the facts were different† from those shown on the second

*That refusal was an "open defiance of our ruling"; the trial court should have "bowed in submission to the higher authority" of the *Dodge* case; and the hope was expressed that there would be "no further defiance of our judgment". (See opinion prepared as that of the Supreme Court of Missouri, but filed as dissenting opinion, R. 270.)

†But the Supreme Court of Missouri held that was a mistake and that there was no material difference in the facts on the different trials (R. 254; 226 S. W. at 902-3; 286 Mo.).

trial (R. 216, 217, 221-224); again *excluded* the testimony of Allan McCulloh and Jas. H. McIntosh, which the Appellate Court had previously held admissible (R. 211, 215; 276 Mo. at pp. 131, 135-6); gave a peremptory instruction in the plaintiff's favor for $92,542.09 (R. 231, 233); but left to the jury the question of the statutory 10% damages and attorneys fee (R. 231) which returned a verdict of $15,000 therefor, or a total of $107,542.09 (R. 233).*

Upon appeal, the Supreme Court of Missouri held, *first,* that there was no "material difference between the facts at the last trial and those before the court on the second appeal" (R. 254; *Liebing* v. *Mutual Life,* 226 S. W. 897, 902-3; 286 Mo.) but, *second,* that on a reconsideration of its former opinion [276 Mo. 118] it was convinced that its conclusion there announced (that the *Dodge* case was controlling) was *erroneous* and should be *overruled* (R. 253; 226 S. W. at p. 902); *third,* that there should be a *remittitur* of the $15,000 damages and attorney's fees (to which the plaintiff assented, R. 271); and, *fourth,* that, as so modified, the judgment, thus reduced to $92,542.09 with interest from May 14, 1919, was *affirmed* (R. 254; *Liebing* v. *Mutual Life,* 226 S. W. 897, 903; 286 Mo.).

---

*Net amount due under policy.....	$52,911.43	
6% interest Nov. 20, 1906-May 14, 1919	39,630.66	
10% statutory damages.....	5,000.00	
Attorney's fee for "vexatious delay"	10,000.00	
Total judgment rendered.....		$107,542.09

The Court, speaking by WOODSON, *J.* (the one judge who had dissented on the second appeal), held that the Blees LOAN AGREEMENT was a Missouri contract because "it was but subsidiary to the policy which is admitted to be a Missouri contract", and said (R. 252-254; *Liebing* v. *Mutual Life,* 226 S. W. 897, 902; 286 Mo.):

> "I do not see any material difference between the facts at the last trial and those before the court on the second appeal, though the plaintiff strenuously contends there is a difference. * * *
>
> "There are many propositions presented and discussed in briefs by counsel for each party, but from the view we take of the case *only one of them is worthy of consideration,* and that is: Is the *Dodge Case* controlling in this one? We so held in the case of *Liebing* v. *Mutual Life Ins. Co.,* 276 Mo. 118; but upon a reconsideration of that case we are of the opinion that the contention there announced was erroneous and should not be adhered to."

The Court then attempted to distinguish the Dodge policy from the Blees policy upon two grounds, to wit, (1) that in the Dodge policy there was no absolute obligation on the company to make the loan, *whereas,* the Blees policy compelled the company to make the loan, from which alleged difference (which we deny existed) the Court drew the irrelevant *non sequitur* that the Blees LOAN AGREEMENT was not an independent and collateral contract, but was subsidiary and supplemental to the policy and hence subject to § 7897; and (2) that the Dodge LOAN AGREEMENT recited that it was made in New York under the New York laws,

"the place of said contract being said home office of said company". (For our response to that contention see p. 36 *et seq., infra.*)

Three judges dissented in a long and able opinion (R. 255-270; 226 S. W. at pp. 903-910), which discloses that it had been prepared as the majority opinion, but some judge changed his mind, and it was then filed as the dissenting opinion (R. 255); it stood by the opinion on the second appeal (276 Mo. 118); pointed out that in the *Dodge Case* the Supreme Court of the United States had "all the learning of this [Missouri] Court, as well as our learned Brothers of the Springfield Court of Appeals before it" and

> "at one fell swoop has overturned all of them by holding that our statute § 7897, *supra,* violates the Federal Constitution, in so far as it applies to contracts made by citizens of this state with a corporation in another state. Their language is too plain for misunderstanding, and we were right in our ruling upon the second appeal of this instant case (276 Mo. 118).
>
> "V. The loan agreement being an independent New York contract, as ruled by this court upon the second appeal (276 Mo. 118), and as previously ruled by the United States Supreme Court in the *Head* and *Dodge Cases, supra,* there is but little left in this case, notwithstanding the voluminous reply (outlined *supra*) of the plaintiff.
>
> The Federal Court rules that our statute in force at the issuance of this policy (§ 7897, *supra*) is violative of the Federal Constitution, in so far as it limits the right to make this independent New York contract, if the statute be given such construction. * * * if, as the Federal Court holds, the parties make the loan contracts as independent contracts in a state other than

Missouri, the contract is the controlling thing thereafter. The real point is that the Missouri statute cannot and does not control a contract made in another state. By the terms of this loan contract, the life insurance contract, "together with any and all moneys which may be or become payable under the same", was conditionally pledged to the defendant in this case. The policy was sent to New York the fixed place of the performance of the contract. The conditions of the pledge were broken by the plaintiff and her husband. She was a party to the pledge, and therefore had full notice of its conditions. Not only so, but by this agreement the surrender value of the policy was agreed upon and fixed by the parties themselves. * * * It cannot well be said that the parties to an insurance contract cannot make a valid agreement as to a cancellation of the insurance contract, and a settlement of the matters between them. This loan agreement, under the rulings, *supra,* is such a contract. So that if the act of the corporation in cancelling the policy was had in pursuance of the terms of the loan agreement, and not otherwise in violation of law, the policy was a dead instrument at the institution of this suit."

The dissenting opinon thus paid its respects to the trial judge who on the third trial had so openly refused to follow the decision [276 Mo. 118] on the second appeal, saying (R. 270):

"This refusal was in *open defiance* of our ruling. We had ruled as we rule now, that the loan agreement was a New York contract, to be construed by New York laws. Whilst this court had ruled otherwise, yet this court bowed in submission to the higher authority, and the trial court should have done likewise. Unless the Federal court changes its ruling there is nothing to be gained by the prolongation of this litigation.

Under such ruling the contract of loan is a New York contract to be construed by the New York law. We trust there will be *no further defiance* of our judgment, when we again repeat that the laws of New York (where pleaded) tending to show that defendant did not violate them in the cancellation of the insurance contract, under the terms of the loan agreement, were competent evidence in this case. And further that absent any specific law to the contrary, the terms of the loan contract are sufficient to authorize the cancellation of the insurance contract."

A writ of error was allowed (R. 277); and a *certiorari* applied for, which was postponed until a consideration of the merits.

THE MISSOURI NON-FORFEITURE STATUTE INVOLVED.*

The Missouri non-forfeiture statute in force when the Blees' policy was issued reads as follows:

"Sec. 7897. **Policies Non-Forfeitable, When.**— No policies of insurance on life hereafter issued by any life insurance company authorized to do busi-

*The Missouri non-forfeiture statute was originally § 5983 R. S. Mo. 1879, which in substantially the same form appears as § 5856 R. S. Mo. 1889 and § 7897 R. S. Mo. 1899; but seven days after the decision in *Smith* v. *Mutual Benefit*, 173 Mo. 329, wherein it was held that the only indebtedness which could be deducted from the net value was that given on account of "past premium payments", and which, if it remained the law, would prevent Missouri policy holders from borrowing on their policies for any purpose except to pay premiums, the Missouri Legislature, then in session, amended § 7897 by the Amendatory Act of 1903 (Laws 1903, p. 208), so as to permit the deduction of any kind of indebtedness; and as thus amended the Missouri non-forfeiture law is now § 6151 R. S. Mo. 1919.

ness in this State, on and after the first day of August, A. D. 1879, shall, after payment upon it of three annual payments, be forfeited or become void, by reason of nonpayment of premiums thereof, but it shall be subject to the following rules of commutation, to wit: The net value of the policy, when the premium becomes due, and is not paid, shall be computed upon the Actuaries' or Combined Experience Table of Mortality, with 4% interest per annum, and after deducting from three-fourths of such net value, any notes or other evidence of indebtedness to the company, given on account of *past premium payments* on said policies, issued to the insured, which indebtedness shall be then canceled, the balance shall be taken as a net single premium for temporary insurance for the full amount written in the policy; and the term for which said temporary insurance shall be in force shall be determined by the age of the person whose life is insured at the time of default of premium, and the assumption of mortality and interest aforesaid; but, if the policy shall be an endowment, payable at a certain time, or at death, if it should occur previously, then, if what remains as aforesaid shall exceed the net single premium of temporary insurance for the remainder of the endowment term for the full amount of the policy, such excess shall be considered as a net single premium for a pure endowment of so much as said premium will purchase, determined by the age of the insured at date of default in the payment of premiums on the original policy, and the table of mortality and interest aforesaid, which amount shall be paid at end of original term of endowment, if the insured shall then be alive."

ASSIGNMENTS OF ERROR (R. 273-275).

That § 7897 R. S. Mo. 1899 is unconstitutional because it is in violation of the 14th Amendment, in that it destroys the right of borrowing money outside of Missouri and impairs the liberty of contract guaranteed by that Amendment.

It is hoped that the foregoing carefully prepared chronological "Statement of the Case", with its constant citation of the pages of the Record in its support, may aid this Court in readily grasping what the dissenting opinion below (R. 270) calls "the real live issues in the case" disentangled (1) from "much of the *trash* contained in the pleadings", and (2) from the badly arranged record, which duplicates papers, presents them in a most confusing order, and contains much unnecessary matter.

SUMMARY OF POINTS DISCUSSED.

1. **The loan agreement was a New York contract and was not subject to the laws of Missouri, and the policy was properly cancelled under the terms of the loan agreement and in strict compliance with the laws of New York.**

2. **The Judgment should be reversed on the authority of New York Life Ins. Co. v. Dodge, 246 U. S. 357.**

FIRST POINT.

The loan agreement was a New York contract and was not subject to the laws of Missouri; and the policy was properly cancelled under the terms of the loan agreement and in strict compliance with the laws of New York.

We submit:

I. *The policy was a Missouri contract.*

As the application for the original policy was signed and delivered to the Mutual Life's agent in Missouri (R. 2, 5, 15, 53, 56); as the policy was delivered by the agent to Blees in Missouri (R. 53); and as Blees accepted it and paid the initial premium in Missouri (R. 12, 15, 40, 53, 54, 59, 60), *thereby for the first time bringing a contract into existence,* the policy was unquestionably a *Missouri* contract.*

II. *Blees had the constitutional right, while remaining in Missouri, to make a valid contract, i. e., the Loan Agreement, outside the State; and Missouri could neither prevent the contract nor modify its terms, even though some acts pursuant to such already existing contract, were performed in Missouri.*

In *Allgeyer* v. *Louisiana,* 165 U. S. 578, 592, a firm of New Orleans cotton exporters, apparently while

**Equitable Life Society* v. *Clements,* 140 U. S. 226, 232; *Mutual Life Ins. Co.* v. *Cohen,* 179 U. S. 262, 264; *Mutual Life Ins. Co.* v. *Hill,* 193 U. S. 551, 554; *Northwestern Life Ins. Co.* v. *McCue,* 223 U. S. 234, 247, 248; *New York Life* v. *Dodge,* 246 U. S. 357, 372.

remaining in Louisiana [Cf. 165 U. S. at pp. 584, 591; 46 La. Ann. 922, 927] made a contract (presumably by mail) with a New York insurance company for a $200,000 open policy of marine insurance to cover the firm's cotton to be exported from New Orleans; the premiums were to be paid by the firm remitting drafts from New Orleans to New York; losses to be payable to the firm in New York; the company to be notified in New York by mail or telegram from New Orleans of each shipment as it was made; and on presentation to the company in New York of an order from the exporters mailed from New Orleans, the company would issue and deliver in New York a separate policy to cover the cotton then in New Orleans and about to be shipped.

A Louisiana statute made it a crime for any person to "fill up, sign or issue" in Louisiana any certificate of insurance under an open marine policy or to do any act in Louisiana "to effect for himself or for another" any insurance on property in Louisiana, in any insurance company not authorized to do business therein.

Allgeyer was prosecuted for having mailed in Louisiana a letter or certificate of insurance to the unauthorized company in New York, advising it of a specific 100 bales of cotton in Louisiana to be insured under the open policy. He was convicted in the State Court.

This Court held that the open policy having been made in New York, the State of Louisiana could not

prevent one of its citizens, after the contract was made, from doing an act in Louisiana under such contract.

The Court said (pp. 588-592):

"The letter of notification did not constitute a contract made or entered into within the State of Louisiana. It was but the performance of an act rendered necessary by the provisions of the contract *already made* between the parties outside of the State. It was a mere notification that the contract already in existence would attach to that particular property. In any event, the contract was made in New York, outside of the jurisdiction of Louisiana, even though the policy was not to attach to the particular property until the notification was sent.

It is natural that the state court should have remarked that there is in this 'statute an apparent interference with the liberty of defendants in restricting their right to place insurance on property of their own whenever and in what company they desired.' Such interference is not only apparent, but it is real * * *.

The Supreme Court of Louisiana says that the act of writing within that State, the letter of notification, was an act therein done to effect an insurance on property then in the State, in a marine insurance company which had not complied with its laws, and such act was, therefore, prohibited by the statute. As so construed we think the statute is a violation of the Fourteenth Amendment of the Federal Constitution, in that it deprives the defendants of their liberty without due process of law. The statute which forbids such act does not become due process of law, because it is inconsistent with the provisions of the Constitution of the Union. The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the en-

joyment of all his faculties to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned. * * *

Has not a citizen of a State, under the provisions of the Federal Constitution above mentioned, a right to contract outside of the State for insurance on his property —a right of which state legislation cannot deprive him? * * * When we speak of the liberty to contract for insurance or to do an act to effectuate such a contract already existing, we refer to and have in mind the facts of this case, *where the contract was made outside the State, and as such was a valid and proper contract.* The act done within the limits of the State under the circumstances of this case and for the purpose therein mentioned, we hold a proper act, one which the defendants were at liberty to perform and which the state legislature had no right to prevent, at least with reference to the Federal Constitution. To deprive the citizen of such a right as herein described without due process of law is illegal. Such a statute as this in question is not due process of law, because it prohibits an act which under the Federal Constitution the defendants had a right to perform. This does not interfere in any way with the acknowledged right of the State to enact such legislation in the legitimate exercise of its police or other powers as to it may seem proper. In the exercise of such right, however, care must be taken not to infringe upon those other rights of the citizen which are protected by the Federal Constitution.

In the privilege of pursuing an ordinary calling or trade and *of acquiring, holding and selling property,* must be embraced the right to make *all proper contracts in relation thereto,* and although it may be conceded that

this right to contract in relation to persons or property or to do business within the jurisdiction of the State may be regulated and sometimes prohibited when the contracts or business conflict with the policy of the State as contained in its statutes, *yet the power does not and cannot extend to prohibiting a citizen from making contracts of the nature involved in this case outside of the limits and jurisdiction of the State, and which are also to be performed outside of such jurisdiction;* nor can the State legally prohibit its citizens from doing such an act as writing this letter of notification, even though the property which is the subject of the insurance may at the time when such insurance attaches be within the limits of the State.

The mere fact that a citizen may be within the limits of a particular State does not prevent his making a contract outside its limits while he himself remains within it. *Milliken* v. *Pratt,* 125 Mass. 374; *Tilden* v. *Blair,* 21 Wall. 241. *The contract in this case was thus made.* It was a valid contract made outside of the State, to be performed outside of the State, although the subject was properly temporarily within the State. As the contract was valid in the place where made and where it was to be performed, the party to the contract upon whom is devolved the right or duty to send the notification in order that the insurance provided for by the contract may attach to the property specified in the shipment mentioned in the notice, must have the liberty to do that act and to give that notification within the limits of the State, any prohibition of the statute to the contrary notwithstanding. The giving of the notice is a mere collateral matter; it is not the contract itself, but is an act performed pursuant to a valid contract which the State had no right or jurisdiction to prevent its citizens from making outside the limits of the State.

The Atlantic Mutual Insurance Company of New York has done no business of insurance within the State

> of Louisiana and has not subjected itself to any provisions of the statute in question. It had the right to enter into a contract in New York with citizens of Louisiana for the purpose of insuring the property of its citizens, even if that property were in the State of Louisiana, *and correlatively the citizens of Louisiana had the right without the State of entering into contract with an insurance company for the same purpose.* Any act of the state legislature which should prevent the entering into such a contract, or the mailing within the State of Louisiana of such a notification as is mentioned in this case, is an improper and illegal interference with the conduct of the citizen, although residing in Louisiana, in his right to contract and to carry out the terms of a contract validly entered into outside and beyond the jurisdiction of the State."

This case establishes then, beyond dispute, that Blees had the constitutional right, even while remaining in Missouri, to make a contract in New York (*a*) to borrow $9,550, (*b*) to pledge his policy as security therefor, (*c*) to agree upon terms for the loan's repayment or the application of the policy's value thereto—all of which were proper and essential contracts to his exercise of those fundamental rights of earning a living in lawful callings and disposing of his property, which the Federal Constitution guarantees against State action—and the ability to borrow money at legal rates of interest is one of the most innocent, valuable and lawful of individual rights.

The next question is this: Did Blees make the "LOAN AGREEMENT" contract in Missouri or was it made outside of Missouri, *i. e.,* in New York?

III. *The Loan Agreement was a New York contract.*

Although Mr. and Mrs. Blees signed the LOAN AGREEMENT in Missouri, it was but a mere *proposal* to the Mutual Life; no one in Missouri was authorized to accept it on behalf of the Mutual Life (R. 172); the company's local office physically took it and transmitted it to the Home Office in New York for action thereon; the Home Office considered and accepted it in *New York,* and made the $9,550 loan in New York; applied there $4,291.50 of the loan to the payment of the past due 4th premium, thereby continuing the policy in force for another year without the necessity of any further notice to or action by Blees; issued and signed in New York a receipt for the premium and mailed it, together with a check on a New York bank for the cash balance, to its St. Louis office for delivery to Blees; and such local office, through Payson, in turn delivered the papers to Blees, who deposited the check which was duly paid on presentation in New York.

Was the LOAN AGREEMENT, under those circumstances, a New York or a Missouri contract?

As it was in *New York,* and in New York *alone,*

(*a*) That the Mutual Life acted on the LOAN AGREEMENT (physically there present) by approving and accepting it and thereby creating a contractual relation;

(*b*) That the $9,550 loan was made;

(*c*) That out of such loan the 4th premium was paid and the policy thereby made obligatory for another year, and the premium receipt signed;

(*d*) That a check for the $4,790.50 cash balance was drawn on a New York bank and signed;

(*e*) That the LOAN AGREEMENT was physically and continuously kept from the moment it became a binding contract until this time;

(*f*) That the loan was to be repaid; and

(*g*) That the contract was *physically present* at its *date* Oct. 12, 1904:

And as each of those steps was taken, and to be taken, in *New York* and nowhere else, it can not possibly be a Missouri contract, simply because a receipt (mere evidence of a *past* part payment in *New York*) and a check on New York were sent by the Mutual Life from New York to be physically delivered to Blees in Missouri.

They were, as in the *Allgeyer Case,* mere collateral acts performed pursuant to a valid contract previously made outside of Missouri.

If a Missouri Court can hold, as here, that the mere preliminary act of writing the proposal in Missouri, and its delivery to a local agent, plus the final act of physically receiving in Missouri a portion of the proceeds of a loan previously made in New York, makes it a *Missouri* contract, then, could not a New York court hold, with equal force, that as the acceptance took place in New York, as the loan was made in New York, as the money was applied to the past due premium and interest there, and as a check was mailed from New York for the cash balance, it was a *New York* contract? And yet a LOAN AGREEMENT cannot be, at one and the same time, both a Missouri contract *and* a New York contract. Whether a particular contract is of one state or the other depends on certain principles which have been laid down by the Courts, and are not difficult of application here, because this Court has in two cases decided the precise question.

TWO CONTROLLING DECISIONS.

In two cases this Court has decided that § 7897 is unconstitutional and has no effect upon a Loan Agreement made in New York.

I.

In *N. Y. Life Ins. Co.* v. *Head,* 234 U. S. 149, a resident of New Mexico, while in Missouri, applied for, paid the premium on, and received delivery in Missouri of a life insurance policy, which was admittedly a *Missouri* contract. Years later, the beneficiary wrote from New Mexico directly to the company's Home Office in New York, applying for a $2,270 cash loan (none of which was used for "past premium payments") and sent the policy as security, together with a Loan Agreement, providing (1) that it should be payable in New York, and (2) that if any premium on the policy or interest on the loan were not paid when due, settlement of the loan should be made by granting paid-up insurance for a greatly reduced amount under the New York insurance law. There was a default in the payment of interest and premium; and pursuant to the terms of the Loan Agreement and the New York law, the $2,270 loan and $9.46 interest were paid out of the policy's $2,349.60 cash value, and the $70.14 balance was used to purchase $89 paid-up insurance, which was duly endorsed on the policy which was then sent to the beneficiary in New Mexico (234 U. S. 155-6; Record in *Head* case, pp. 96, 97).

After Head's death, the beneficiary sued for the

full amount of the original policy upon the same theory as here, namely, that § 7897 did not permit the company to deduct its entire loan from the reserve, but required the company to apply 75% of the reserve [less only such part of the indebtedness as had been created in order to pay *past premiums*] to purchase temporary extended insurance for the full face value of the original policy.

The Missouri court held that, as the policy was originally a Missouri contract, the loan agreement was subsidiary thereto, and could not alter, change or modify the rights and obligations as they existed under the original policy and § 7897 which must be read into the policy as a part thereof (*Head* v. *Ins. Co.*, 241 Mo. 403, 418; 234 U. S. at pp. 157, 159, 165); and that § 7897 must control the settlement of the policy, *i. e.*, 75% of the $2,349.60 reserve must be applied to extend the $10,000 policy past the date of Head's death.

This Court *reversed* the Missouri court, and held (1) that it was not necessary to decide whether the loan agreement was or was not subsidiary to the original policy,* but (2) that the loan agreement having been made in New York, the State of Missouri had no power to forbid or alter it simply because it modified the policy. After stating fully the views of the Missouri courts with respect to the effect of § 7897 on subsequent loan agreements and citing the Missouri

*But cited *S. S. White Dental Mfg. Co.* v. *Delaware Ins. Co.*, 105 Fed. 642; 2 Wharton's Conflict of Laws, Sec. 467*g* and 63 L. R. A. 833, note, holding that such later agreements are *not* subsidiary, but are collateral *independent* contracts (234 U. S. 165).

cases so holding [See 234 U. S. 159] CHIEF JUSTICE WHITE placed the decision on the broad ground that the parties had the right to contract in New York for the loan, for the mode of its re-payment and the application of the policy value to that end; and that having done so, Missouri could not by its laws reach out beyond its borders and nullify the loan contract, saying (pp. 160, 161):

> "Coming to the merits, to narrow the subject to be decided as much as possible, we pass the consideration of the ruling below holding that under the proof the contract was a Missouri contract and therefore for the sake of argument only concede that there was power in the State to treat the contract made for the purposes stated as a Missouri contract and to subject it as to matters and things which were legitimately within the state authority, to the rule of the state law.
>
> "And this concession brings us to consider the second general inquiry which is the power of the State of Missouri to extend the operation of its statutes beyond its borders into the jurisdiction of other States, so as in such other States to destroy or impair the right of persons not citizens of Missouri to contract, although the contract could in no sense be operative in Missouri and although the contract was sanctioned by the law of the state where made. That is to say, the right of a State where a contract concerning a particular subject-matter, not in its essence intrinsically and inherently local, is once made within its borders, not merely to legislate concerning acts done or agreements made within the State in the future concerning such original contract, *but to affect the parties to such original contract with a perpetual contractual paralysis following them outside the jurisdiction of the State of original contract by prohibit-*

> ***ing them from doing any act or making any agreement concerning the original contract not in accord with the law of the State where the contract was originally made.*** In other words, concretely speaking we must consider the validity of the loan agreement, that is, how far it was within the power of the State of Missouri to extend its authority into the State of New York and there forbid the parties, one of whom was a citizen of New Mexico and the other a citizen of New York, from making such loan agreement in New York ***simply because it modified a contract originally made in Missouri.*** Such question, we think, admits of but one answer since it would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State and in the State of New York and there destroy freedom of contract without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the government under the Constitution depends.
>
> This is so obviously the necessary result of the Constitution that it has rarely been called in question and hence authorities directly dealing with it do not abound. The principle however lies at the foundation of the full faith and credit clause and the many rulings which have given effect to that clause."

The *Head Case* then conclusively settled that § 7897 could not constitutionally override an agreement *made in New York* providing (in the event of the non-payment of the debt) for a different disposition of the policy's value than that prescribed by the Missouri statute.

It may be suggested that, in the *Head Case,* the beneficiary was in New Mexico and a citizen thereof

when she made the subsequent loan agreement, and hence it was in *no* sense a Missouri contract, while Blees was in Missouri, and that his loan agreement *was* really a Missouri contract and hence subject to § 7897. That objection is *fully met* by the second controlling case now to be noticed.

II.

In *New York Life Ins. Co.* v. *Dodge,* 246 U. S. 357, the policy was applied for and delivered in Missouri to Dodge, a citizen of that State, and it was admittedly a Missouri contract (pp. 368, 372). Some years later Dodge signed in Missouri (1) a written application for a loan addressed to the company at its New York office, and (2) a proposed Loan Agreement. He delivered both papers, together with the policy, to the company's local St. Louis office, which forwarded them to the Home Office in New York for action. It received and accepted them in New York, made the loan and mailed to Dodge, in Missouri, a check for the amount drawn on a New York bank. For several years, successive loans were made in that same manner; the new loan being used to pay off the old loan and to pay the next premium, a check for the balance being mailed to Dodge. The last loan (1906) was not quite enough to pay off both the old loan and the current premium; and so Dodge paid the difference, $116.40, in Missouri.

The Loan Agreement provided that if any premium were not paid when due, the company might close out

the loan as provided in the policy, which was to apply any excess of the reserve over the indebtedness, as a single premium to purchase *paid-up* insurance.

The October, 1907 premium was not paid, and in December, in accordance with the terms of the pledge and the New York law, the company closed out the loan; and as it was really a little more than the reserve, there was no balance left over to go to Dodge. He was so notified and made no objection.

After his death, the beneficiary sued for the face of the policy (less the loan) upon the ground that only $599.65 of the loan had been applied to "past premium premiums", and that 75% of the reserve (minus $599.65) was enough under § 7897 to extend the policy beyond Dodge's death.

The Missouri court, just as in the instant case, held § 7897 to be controlling, but this Court *reversed* the judgment, held § 7897 to be void, and said (pp. 373, 375, 376-7):

> "Here the controversy concerns effect of the state statute upon agreements between the parties made long *after* date of the policy and action taken thereunder; their essential fairness and accordance with New York laws are not challenged.
>
> "Considering the circumstances recited above, we think competent parties consummated the loan contract now relied upon in New York where it was to be performed. And, moreover, that it is one of a kind which ordinarily no State by direct action may prohibit a citizen within her borders from making outside of them. * * *
>
> "Treating the loan to Dodge as made under a New York agreement which Missouri lacked power directly

to control, the question presented becomes similar in principle to the one decided in *New York Life Insurance Co.* v. *Head,* 234 U. S. 149. * * *

"Under the laws of New York, where the parties made the loan agreement now before us, it was valid; *also it was one which the Missouri legislature could not destroy or prevent a citizen within its borders from making beyond them by direct inhibition;* and applying the principles accepted and enforced in *New York Life Insurance Co.* v. *Head,* we think the necessary conclusion is that such a contract could not be indirectly brought into subjection to statutes of the State and rendered ineffective through a license authorizing the insurance company there to do business.

"As construed and applied by the Springfield Court of Appeals, § 7897 transcends the power of the State. To hold otherwise would permit *destruction of the right* —often of great value—*freely to borrow money upon a policy from the issuing company at its home office* and would, moreover, sanction the impairment of that liberty of contract guaranteed to all by the Fourteenth Amendment."

That case broadly held that if a citizen of Missouri possessed a property right he could contract with respect to it in New York, although himself remaining in Missouri, and that Missouri could not control the effect of *that* contract, even though it affected the performance of a contract previously made in Missouri.

III.

A. The *Dodge* and the instant case are practically *identical.* In each, (1) the insured and beneficiary were residents of Missouri; (2) the application and policy were delivered in Missouri and the premium paid

there; (3) the proposed Loan Agreement was signed by the insured and beneficiary in Missouri, and together with the policy were delivered to, and transmitted by, the company's Missouri agency to the Home Office in New York; (4) the Home Office accepted the loan, paid the past due premium out of the proceeds, and mailed a check from New York—in one case direct to Dodge, and, in the other, to the company's agency in Missouri for delivery to Blees; (5) the premium was not paid when due, and the company settled the loan by deducting it from the policy's reserve exactly as provided by the loan agreement and the laws of New York.

B. What if any *differences* are there? None save in two minor details, which do not affect the principles on which the *Allgeyer, Head* and *Dodge* cases are based.

(*a*) The *Dodge* policy provided (246 U. S. 368; Dodge Record, p. 22):

> "CASH LOANS AVAILABLE ON DEMAND. Cash loans *can* be obtained by the insured on the sole security of this policy *on demand* at any time" after two premiums are paid, etc.

The *Blees* policy provided (R. 41):

> "After three years the company *will* * * * loan amounts within the limits of the cash surrender value", etc.

The Missouri court insisted (R. 253) that there was a "marked" difference between the two, because

the use of the word *"can"* in the Dodge policy left it *optional* (!) with the company to make the loan, while the use of *"will"* in the Blees policy imposed an absolute legal obligation on the company to make the loan; from which the court deduced the irrelevant conclusion that the loan agreement in the Dodge case was an *independent* contract while in the Blees case it was *subsidiary,* and hence under § 7897.

It need only be responded (1) that in each case the company was equally *bound* to make the loan, as the language means the same thing, and no court would hold that under the Dodge policy the company could make or refuse the loan at its option; and (2) that it is not necessary to consider the supposed distinction between the "independent" and "subsidiary" nature of the two loan agreements because in the *Head Case,* this Court expressly held that § 7897 was void no matter whether the loan agreement was "independent" or "subsidiary", saying (234 U. S. 165):

> "But before we come to direct the judgment of reversal, we briefly refer to another aspect of the subject, that is, the ruling of the court below as to the *subsidiary* nature of the loan agreement and its consequent control by the broader principle upon which its conclusion was really based.
>
> Of course under the view which we have taken of the case, that is, of the *want of power* of the State of Missouri because the contract of insurance was made within its jurisdiction to forever thereafter control by its laws all subsequent agreements made in other jurisdictions by persons not citizens of Missouri and lawful

> where made, that is, to stereotype, as it were, the will of the parties contracting in Missouri as of the date of the contract, it is unnecessary to consider whether the loan agreement was or was not subsidiary, but see on this subject *Leonard* v. *Charter Oak Life Ins. Co.*, 65 Conn. 529; *Fireman's Ins. Co.* v. *Dunn*, 22 Ind. App. 332; *S. S. White Dental Mfg. Co.* v. *Delaware Ins. Co.*, 105 Fed. 642; 2 Wharton Conflict of Laws, Sec. 467*g* and cases cited; and see note 63 L. R. A. 833."

Furthermore, Mr. JUSTICE MCREYNOLDS in the prevailing opinion in *New York Life* v. *Dodge*, pointed out that if § 7897 prohibited the valid pledge of the policy as a security for the loan, then the provision in the policy providing for loans would not require the company to make the loan, saying (p. 373):

> "It should be noted that the clause in the policy providing 'cash loans can be obtained by the insured on the sole security of this policy on demand, etc.' certainly imposed no obligation upon the company to make such a loan *if* the Missouri statute applied and inhibited valid hypothecation of the reserve as security therefor as defendant in error maintains. She cannot, therefore, claim anything upon the theory that the loan contract actually consummated was one which the company had legally obligated itself to make upon demand."

So here, if the Missouri statute § 7897 lawfully prohibited (as Mrs. Liebing's counsel contends) Mr. Blees from making a *valid* pledge of the policy to secure the cash loan for general purposes (other than for "post premium payments"), then, of course, there was no compulsory obligation on the company to lend Blees

the money without security; and as McReynolds, *J.*, said:

> "She cannot, therefore, claim anything upon the theory that the loan contract actually consummated was one which the company had legally obligated itself to make on demand."

See also *Fourth Street Bank* v. *Yardley,* 165 U. S. 634, 651-652.

(*b*) The Dodge loan agreement *recited* that the application for the loan was made, accepted and the money paid in and payable at New York, and that it was made under the laws of New York, which was the place of the contract (see paragraph 5: 246 U. S. at p. 371).

The Blees agreement merely made the loan payable in New York.

The *Dodge Case* opinion neither relied on nor commented upon the *recital* in the loan agreement; doubtless, because, as even the dissenting Justices said (246 U. S. 382):

> "Where the validity of a provision is dependent upon the place in which the contract is made, the *actual facts* alone are significant."

The mere *recitals* could not make it a contract of one place or another, nor control the *facts,* which alone determined whether the Dodge loan agreement was made in Missouri or made in New York. If mere *recitals* could control, then nearly every insurance policy would be held to be a contract of the State of the company's Home Office, instead of where the policy was delivered and the premium paid.

So it is the "actual facts" which must determine where the Blees Loan Agreement was made; and they are practically identical with the facts in the Dodge case.

Blees did not do in Missouri all* the things which the dissenting Justices (BRANDEIS, DAY, PITNEY and CLARKE) urged in the *Dodge Case* (246 U. S. 379) made it a Missouri contract; and yet this Court held that those things were *not* sufficient to make it a Missouri contract.

Conversely, the dissenting Justices vainly urged that the company only did a few, more or less routine, matters in New York, such as receiving, examining and filing the papers sent on from its St. Louis agency, made the calculations and the entries, saying (246 U. S. 380, 381):

> "But when the loan agreement here in question was made, nothing was done in New York, except to examine and file the papers and to make the calculations and entries. No discretion was exercised there by the Company's official. * * * The functions exercised by the officials at New York were limited to determining whether the calculations were correct and whether papers were properly executed and filed. * * * It [loan agreement] was an act contemplated by the policy and was subsidiary to it, as an incident thereof. What was done by the officials at the Home Office was not making a New York contract, but performing acts under a Missouri contract."

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*Blees did not sign any separate application or letter of instructions, while Dodge signed both such documents in Missouri (See 246 U. S. at pp. 369, 371, 379).

Nevertheless, this Court held that *those simple acts* —routine if you choose so to term them—made it a *New York* contract. Why? Because the act of assent was there given. Now, in the present case there were exactly the same routine acts of acceptance as in the *Dodge* case; and, in addition, the Company, *in New York,* partly *performed* the contract by paying (out of the loan) the past due 4th premium, thereby irrevocably continuing the policy for a year, and executed a receipt therefor. Therefore, the Blees agreement was also a New York contract.

Finally, the discussion by the dissenting Justices of the *Allgeyer* and *Head* cases (246 U. S. 384-387) shows that even they concede § 7897 to be void as applied to a loan agreement made in New York, even though made by Missouri citizens respecting a Missouri policy; but the point of their dissent was that, under the facts of the Dodge case, it was *not* a New York contract.

A majority of this Court decided otherwise; and the law of this Court now is that when a citizen of Missouri, having a Missouri policy, executes a proposed loan agreement in Missouri and transmits it, with the policy, even through the company's local agency, to the Home Office in New York, where it is reviewed, accepted, and acted on there, *such agreement is a New York contract* and is not subject to the control of the Missouri statutes.

Therefore, so long as the *Dodge Case* remains the

law of this Court, it is settled that even such small acts as were there done in New York—and the same acts were done in the case at bar—are sufficient to make it a *New York* contract.

IV.

The Blees loan was closed out in strict compliance with the Loan Agreement and the New York laws* (See depositions of McCulloh and McIntosh, R. 178-206).

The case principally relied on by Mrs. Liebing's counsel in cross-examining Mr. McIntosh (R. 196) was a decision of the Appellate Division, *Stevens* v. *Mutual Life,* 183 App. Div. 629, but on appeal it was *reversed!* (*Stevens* v. *Mutual Life,* 227 N. Y. 524).

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* *Hiscock* v. *Varick Bank,* 206 U. S. 28, 38; *Clare* v. *Mutual Life,* 201 N. Y. 492; *Stevens* v. *Mutual Life,* 227 N. Y. 524; *Frese* v. *Mutual Life,* 11 Cal. App. 387; *Eagle* v. *N. Y. Life,* 48 Ind. App. ; *Adams* v. *Mutual Life,* 132 N. E. 688; *Wilson* v. *Royal Ins. Co.,* 137 Iowa 184; *Cotnam* v. *Iowa M. L.,* 180 Iowa 1141; *Fidelity Mutual* v. *Oliver,* 111 Miss. 133; *Rye* v. *N. Y. Life,* 88 Neb. 707; *Cilek* v. *N. Y. Life,* 95 Neb. 274; *Candelaria* v. *Columb. Life,* 60 Colo. 340; *Ruane* v. *Manhattan Life,* 184 Mo. App. 214, 222; *Tennent* v. *Union Central,* 133 Mo. App. 345, 351.

SECOND POINT.

The judgment should be reversed on the authority of New York Life Ins. Co. v. Dodge, 246 U. S. 357.

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April 17, 1922.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912

No. 715

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PLAINTIFF IN ERROR,

vs.

MARY S. HETTING, DEFENDANT IN ERROR.

In Error to the Supreme Court of the State of Minnesota.

BRIEF FOR DEFENDANT IN ERROR.

JAMES J. O'CONNOR,
Attorney for Defendant in Error.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 215.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PLAINTIFF IN ERROR,

vs.

MARY S. LIEBING, DEFENDANT IN ERROR.

In Error to the Supreme Court of the State of Missouri.

BRIEF FOR DEFENDANT IN ERROR.

(Figures in parenthesis refer to pages in the printed transcript of the record.)

STATEMENT OF THE CASE.

MAY IT PLEASE THE COURT:

We first call attention of this Honorable Court to motion to dismiss writ of error and motion to affirm

judgment and argument which were submitted on the 10th day of October, 1921, and postponed to hearing on the merits. And we also call attention to the petition for writ of certiorari and brief opposing same, which were likewise postponed.

We have been awaiting brief from plaintiff in error's counsel, but without avail. Therefore, without the benefit of seeing opposing counsel's brief we begin preparing ours on this 27th day of March, 1922. We have made it our custom to be as liberal as possible with our opponents in all cases, nevertheless, we are disappointed that our opponents have not seen fit to give us a copy of their brief in time, because the two weeks allowed to defendant in error under the rules to prepare, print, index and file her brief is short enough.

With the very large array of counsel for plaintiff in error and the length of time this case has been in court, no reason is apparent for plaintiff in error's violation and noncompliance with the rules. In view of the fact that we have not seen the brief of opposing counsel, we are obliged to make a statement of the case here.

Frederick W. V. Blees, a naturalized citizen of the United States and a resident and citizen of the State of Missouri, in November, 1901, made application to Mr. D. H. Payson, plaintiff in error's Macon, Missouri,

representative, for a policy of insurance, and on or about the 31st day of December, 1901, the policy in suit was delivered to him at Macon, Missouri, by said D. H. Payson (52, 53).

POLICY.

The policy stipulates that it "**is issued upon the condition that on its delivery there shall be deposited with the company the sum of forty-two hundred and ninety-one dollars and fifty cents**" (40). This payment was made by insured to Mr. Payson at Macon, Missouri, when the latter delivered the policy to the former (53). And the policy further stipulates that in the event of the death of insured, plaintiff in error, upon acceptance of due proofs thereof, would deliver to his executors, administrators or assigns fifty bonds, each of the denomination of one thousand dollars, or in lieu thereof pay sixty-five thousand two hundred and fifty gold dollars; provided, all deposits previously due thereon shall have been made and the policy maintained in full force and effect from date of issue.

Under the table of values in said policy, upon payment of the fourth annual deposit, the paid-up value is **$522** per thousand, or a total of **$26,100** paid-up insurance, which, calculated under the American 3 per cent, is of the cash value of **$263.40** per thousand

(138, 139), or a total cash value of **$13,170.00,** being $3,620.00 in excess of the loan; and calculated under the actuaries' 4 per cent, is of the cash value per thousand of **$223.71** (140), or a total cash value of **$11,185.50, being $1,635.50 in excess of the loan;** and under said table of values, upon payment of the fourth annual premium, the policy was extended, in case of default in the payment of premiums, for **twelve years and eleven months;** and the same table of values gives $191.00 per thousand as the cash surrender value, or a total of **only $9,550.00** (43). The amount of surplus provisionally held by plaintiff in error is $10.38 per thousand, or a total of $519.00 (91).

Under the caption "**Loans**" the policy stipulates:

> "After this contract shall have been in force three full years, **within sixty days after written application, and upon the assignment of this contract as security, the company will, in conformity with its rules as then in force,** loan amounts within the limits of the cash surrender value, with interest in advance, at the rate of 5 per cent per annum; provided (1) that the deposits be fully made to the end of the contract year in which the loan falls due; (2) **that in any settlement of this contract all outstanding indebtedness hereon to the company must be paid**" (41).

The beneficiary or assignee is given the option to accept $65,250 in cash or fifty gold bonds of the par

value of $1,000 each. Plaintiff elected to accept cash instead of bonds.

The incontestability stipulation reads: "**After two years from date of issue this contract shall be incontestable if the deposits shall have been duly made.**" The table of paid-up and cash values are on the basis of $1,000, while the terms of extended insurance are the same for all amounts. The premiums were payable in New York City, but were all paid and accepted in Missouri. The bonds were to be delivered in Missouri to insured, his executors, administrators or asigns, but, according to the copy of the form, said bonds were to be made payable in New York City (42, 44).

Under the head "**Surplus**" the policy provides for the apportioning and application of the surplus (41-42).

PETITIONS.

The **original petition**, being the one on which the case was tried the first time, is set forth on pages 93 to 95, inclusive, of the transcript.

This original petition contains substantially the same averments as the second amended petition upon which second amended petition the case went to trial the second time. The second amended petition is set forth on pages 1 to 4, inclusive, of the transcript. In

the original petition, however, there is deducted from the face amount of the policy the sum of **$4,291.50**, being an annual premium for a ten-payment life policy of **$65,250.00**, while in the sceond amended petition the deduction is **$2,228.94**, being the annual premium for an ordinary life policy of **$65,250.00.** The latter deduction was made pursuant to Section 7899, R. S. Mo. 1899, now Section 6153, R. S. Mo. 1919.

This and averments concerning plaintiff in error's vexatious refusal to pay (the latter were stricken out, on defendant's motion), were the sole differences between the petition on which the case went to trial the first time and the one on which it went to trial thereafter. It was affirmatively averred in the original petition that "**on or about the 29th day of September, 1901, defendant, at the City of Macon, County of Macon, in the State of Missouri, * * * insured the life of Frederick W. V. Blees, a resident and citizen of the State of Missouri**" (93). And the Missouri nonforfeiture statutes were there invoked. The original petition also averred: "**Plaintiff further states that on or about the 12th day of October, 1904, at the City of Macon, County of Macon, in the State of Missouri, Frederick W. V. Blees, the insured, borrowed from defendant on the security of said policy the sum of nine thousand five hundred and fifty dollars**" (94). No claim was made either in plaintiff in error's first answer (95-99) or in its amended answer (99-103)

that the New York laws were applicable, but in both answers it was granted that the entire transactions occurred in Missouri and were governed by Missouri law.

The loan agreement is between pages 156 and 157 of the transcript and will be referred to in written argument herein.

ANSWERS.

Indeed, in the amended answer upon which this case went to trial the first time, plaintiff in error invoked in its second affirmative defense **Section 6948, R. S. Mo. 1909**, alleging that there was a condition of the policy violated other than that of nonpayment of premium, and that under that section the plaintiff in error was not liable. It invoked, too, in its third affirmative defense, the amendatory **act of 1903 (Laws 1903, p. 208)**. It based its fourth affirmative defense on Section 7899, R. S. Mo. 1899, requiring (as it claimed) notice to be given and proofs of death to be made ninety days after the death of the insured. And its fifth affirmative defense was founded upon the Missouri five years' statute of limitations (99-103).

Issues were joined on said amended answer and the rights of the parties tried out under the laws of Missouri.

On the first trial, the defendant in error suffered an **involuntary nonsuit**, and her petition was **dismissed**,

and at the **cost** of defendant in error and her bond, which appears from the following, which is a correct copy of the judgment of the trial court, namely:

JUDGMENT OF INVOLUNTARY NONSUIT AND DISMISSAL.

"Now, at this day, come the parties as aforesaid, and come also again the jurors sworn and impaneled herein; thereupon the trial of this cause is resumed and progressed, and at the close of the plaintiff's case, the Court, at the request of defendant, gave to the jury the following instruction, to wit: 'The Court instructs the jury that under the pleadings and the evidence offered for the plaintiff, their verdict must be in favor of defendant.'

"Wherefore, owing to the adverse rulings of the Court, the plaintiff says she will not further prosecute her suit in this behalf, but with leave to move to set the same aside will take a **nonsuit**. It is now, therefore, ordered and adjudged by the Court that the plaintiff's cause of action herein be, and the same is hereby, **dismissed** at the **costs** of said plaintiff and Sarah J. Clauss, the surety on the cost bond herein, for which let execution issue. Instruction filed" (104).

The defendant in error appealed from this judgment. And thereafter, the cause was reversed and remanded. The material part of the mandate follows:

MATERIAL PART OF MANDATE.

"Now at this day come the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the said cause be remanded to the said Court to set aside its order overruling the motion to set aside the nonsuit herein and to sustain said motion, **and to proceed with the cause in a manner not out of accord with the opinion of the Court herein delivered;** and that the said appellant recover against the said respondent her costs and charges herein expended and have execution therefor opinion filed)" (105).

And the Missouri Supreme Court, in its decision, adjudged, among other things, that the Missouri non-forfeiture statutes were applicable and "**disposed of the whole matter.**" And adjudged, furthermore, that:

"**The issuance of the policy, the payment of four annual premiums, the death of the insured, and the assignment of the policy to appellant having been admitted by the answer, and there having been evidence tending to prove Blees died during the period the net value of the policy extended the insurance, and that proof of death was waived, this was not a case the Court should have taken from the jury.**"

Finally, the case was reversed and remanded with directions, among others, to the trial court "**to proceed with the cause in a manner not out of accord with this opinion**" (Liebing v. Mutual Life, 269 Mo. 509).

After the case came down for retrial, the plaintiff in error filed a new answer, in which it departed from and dropped the defense of want of notice and failure to make proofs of death within ninety days after the decease of the insured and deserted the defense based upon the Missouri statute of limitations. And it invoked, for the first time, the laws of the State of New York. And in none of its answers has it stated that the Missouri nonforfeiture statute, Section 7897, R. S. Mo. 1899, is unconstitutional. What it says therein is that to require it to pay this policy will be violative of designated parts of the State and Federal Constitutions. And it invokes the ex post facto Missouri Amendatory Act of 1903, Laws of 1903, p. 208 (11).

DEFENDANT IN ERROR'S REPLY TO PLAINTIFF IN ERROR'S ANSWER TO HER SECOND AMENDED PETITION.

Defendant in error's reply to the amended answer is set forth on pages 11 to 14, both inclusive, of the transcript, and therein defendant in error affirma-

tively pleaded, among other things, that the plaintiff in error was estopped and precluded from setting up the New York laws as a defense herein, because the same had not been timely invoked.

The case was tried the second time, and resulted in a directed verdict for defendant in error, from which plaintiff in error appealed, and the cause was again reversed and remanded, but this time by a divided court and by an opinion which left undecided many material questions involved. This opinion is found in 276 Mo. 118 and pages 210 to 215 of transcript, and the mandate is set forth on page 215 of the transcript.

DENFENDANT IN ERROR'S AMENDED REPLY TO PLAINTIFF IN ERROR'S ANSWER TO HER SECOND AMENDED PETITION.

After the case came down for retrial the second time, the defendant in error filed an amended reply, in which she pleaded many matters in avoidance of the affirmative defensive averments in plaintiff in error's answer; which amended reply is set forth on pages 14 to 30, both inclusive, of the transcript.

MOTION TO STRIKE OUT.

Plaintiff in error filed a motion to strike out almost all of said amended reply, which motion is set forth

"That thereafter, on or about the.....day of October, 1904, Mr. F. N. Cheney, who was defendant's then manager in charge of its St. Louis, Missouri, office, as aforesaid, forwarded said check to Mr. Dwight H. Payson, who was defendant's then soliciting agent at Macon, Missouri, and that thereafter, on or about the.....day of October, 1904, Mr. Dwight H. Payson delivered said check to Frederick W. V. Blees, the insured" (87-90).

On or about the 18th day of October, 1904, the insured and defendant in error endorsed said check and the former deposited the same in the National Bank of Commerce at St. Louis.

W. B. Cowen, vice-president of the bank, testified that the insured was given credit for the check by the bank, and that the same was not deposited for collection.

He testified:

"Q. **Now, if it were deposited for collection, would there be any number on it?**

A. **Yes, there would.**

Q. **And there is not a number on it?**

A. **No, sir.**

Q. **It was treated as a cash transaction between the depositor and the bank?**

A. **Yes, sir**" (218, 219).

On cross-examination, the witness testified that in the event the check was not paid the bank would charge it back immediately to insured's account.

The premiums were paid at Macon to Mr. Payson, plaintiff in error's Macon representative. And defendant in error was asked:

> "Q. **Did Mr. Blees or yourself have any transaction with the home office in New York?**"

And she answered:

> "A. **No, sir**" (56).

On cross-examination, defendant in error was asked concerning the payment of the fourth annual premium, namely:

> "Q. **Well, wasn't the premium due September 29th, 1904, paid out of that loan?**"

And she answered:

> "A. **Yes, it was agreed by both Mr. Blees and myself and Mr. Payson, first the premium was to be paid, and a year's interest in advance on the loan**" (60).

The insured, after he had paid four annual deposits, discontinued the payment of further deposits, and at that time, namely, on the **29th day of Sep-**

tember, 1905, the policy had acquired a net value under the nonforfeiture statutes of Missouri, of **$11,230.83**; that three-fourths thereof is **$8,423.12,** and deducting **$4,759.50** (which is the aggregate amount applied to pay the deposit due on the **29th of September, 1904**, and to pay interest on said loan and premium) leaves **$3,663.62,** which sum, taken as a net single premium as commanded by the Missouri nonforfeiture statute, extends the said policy from date of lapse **(September 29th, 1905) for a period of four years, nine months and eighteen days** (134).

The insured died on the **8th day of September, 1906; that is, eleven months and ten days from the 29th day of September, 1905.** He died within the extended insurance period.

Neither the insured nor defendant in error paid the loan, which was due on the 29th day of September, 1905, but the alleged foreclosure, cancellation of the policy and appropriation of the surrender value thereof to repay the loan, did not occur, according to plaintiff in error's answer (7), until the 15th day of November, 1905, and did not occur, according to its evidence (177), until December 4, 1905.

On or about the 2nd day of March, 1904, at Macon, Missouri, the insured assigned the policy to defendant in error, a native citizen of the United States. Defendant in error testified that neither the insured nor she had any notice of the maturity of the loan;

neither had they any notice of the time when plaintiff in error intended to foreclose, or of the alleged foreclosure. And no demand for payment of said loan or fifth annual premium was ever made on either of them (62, 63).

On redirect examination defendant in error testified:

> "Q. **If you had notice of the maturity of the loan and premium, what would you have done?**
> A. **Why, I would have tried to have seen why Mr. Blees didn't look after it, and if he didn't look after it, I would have looked after it myself**" (63).

She further testified that she was financially able and would have paid the fifth annual premium, as well as the loan and interest on it, if she had been notified of their maturity or nonpayment. She testified, too, that she "**owned considerable property at that time; I owned all the best corners in Macon, Missouri, at that time myself; I had a 780-acre farm. out there; and I owned nearly two-thirds of the carriage factory stock at that time**" (64-65).

Soon after the death of the insured, the defendant in error employed the law firm of Dysart & Mitchell of Macon, Missouri, to collect said policy, and that firm wrote a letter, dated the 3rd day of November, 1906, to Mr. Fred N. Cheney, the plaintiff in error's

St. Louis manager, inquiring about the value of said policy (121, 122). This letter was answered on November 20th, 1906, within ninety days after the insured died, by Mr. James McKean, the plaintiff in error's then general solicitor, in which answer he stated that the policy was not in force at the time the insured died (123).

Thereafter Mr. Frederick L. Allen, the plaintiff in error's general solicitor, took the same position, although his attention had been called to the nonforfeiture statutes of Missouri, and the decisions of Missouri courts construing the same. Proofs of death were furnished plaintiff in error within ninety days after the insured's death, under another policy issued by it on his life (78, 86).

PLAINTIFF IN ERROR'S EVIDENCE.

The principal evidence offered by plaintiff in error was the depositions of Allen McCulloch, general counsel for Equitable Life, and James H. McIntosh, general counsel for New York Life, together with certain **unpleaded New York and Federal decisions,** to prove that the loan agreement and the pledge of the policy and its cancellation for failure to repay the loan were valid and legal under the laws of the State of New York. And for the same purpose plaintiff in error offered in evidence Section 16 of Chapter 218 of the

Laws of New York, 1897. It offered also Section 21 of Chapter 272 of the Laws of New York, 1896, concerning the powers of married women.

Defendant in error objected to said evidence and her objections are set forth on pages 165 to 168 of the transcript. The Court excluded the evidence on grounds, among which are: (1) That the right, if it ever existed, to invoke the New York laws as a defense, was waived by plaintiff in error's failure to timely enough lodge said laws as a defense herein; and further, **"going to trial on the original theory, defending on the original theory"** (179). The Court relied, in part, on State ex rel. v. Reynolds et al., 277 Mo. 14.

(2) Because **"In view of the first decision, which was res adjudicata in this case. For the further reason, I say, the decision in the 269th Missouri, 509, was res adjudicata in this case"** (189).

(3) That the policy and loan agreement were Missouri contracts and controlled by Missouri law; that the facts in the instant case were altogether different from those in the Dodge case, for Dodge corresponded with the home office; and the Court observed, too (220), that: **"It makes considerable of a difference whether he bound himself to be governed by the New York law or not."** (See Lange v. Ins. Co., 254 Mo. 488; Mutual Life v. Cohen, 179 U. S. 262.)

(4) That the facts as developed on this trial are essentially different from those on the second trial, especially so because of the stipulation in evidence which is set forth on pages 87 to 90 of the transcript.

Application was made by plaintiff in error's counsel at the close of the whole case for stay of proceedings until counsel could apply to the Supreme Court of Missouri for a writ of prohibition. The application being overruled, counsel then presented an application for change of venue, which was likewise overruled, as was its demurrer to the evidence.

The Court gave a peremptory instruction to find for defendant in error the sum of $52,911.43 (which represents the amount due under policy after deducting loan, premiums and interest), with interest at 6 per cent per annum, from November 20, 1906, and left to the jury the questions of damages and attorney's fee. The verdict is on page 233 of the transcript. Upon which verdict final judgment was entered and plaintiff in error filed motion for new trial and in arrest, both of which were overruled, and, after taking all necessary steps, it duly appealed the cause to the Missouri Supreme Court for review.

That Court affirmed the judgment on condition that defendant in error would remit the damages and attorney's fee awarded by the jury (254).

Remittitur was entered and judgment was affirmed

(271-272). The dissenting opinion is found on page 255 and following of the transcript. At the time the policy in suit was issued the following Missouri insurance statutes were in force, being Sections 7897 and 7899 of Vol. II of the Revised Statutes of Missouri of 1899, pp. 1842-1843, namely:

"Sec. 7897. **Policies Non-Forfeitable, When.**— No policies of insurance on life hereafter issued by any life insurance company authorized to do business in this state on and after the first day of August, A. D. 1879, shall, after payment upon it of three annual payments, be forfeited or become void by reason of nonpayment of premiums thereof, but it shall be subject to the following rules of commutation, to wit: The net value of the policy, when the premium becomes due and is not paid, shall be computed upon the actuaries' or combined experience table of mortality, with four per cent interest per annum, **and after deducting from three-fourths of such net value any notes or other evidence of indebtedness to the company, given on account of past premium payments on said policies issued to the insured, which indebtedness shall be then canceled, the balance shall be taken as a net single premium for temporary insurance for the full amount written in the policy**; and the term for which said temporary insurance shall be in force shall be determined by the age of the person whose life is insured at the time of default of premium, and the assumption of mortality and interest afore-

said; but, if the policy shall be an endowment, payable at a certain time, or at death, if it should occur previously, then, if what remains as aforesaid shall exceed the net single premium of temporary insurance for the remainder of the endowment term for the full amount of the policy, such excess shall be considered as a net single premium for a pure endowment of so much as said premium will purchase, determined by the age of the insured at the date of default in the payment of premiums on the original policy and the table of mortality and interest aforesaid, which amount shall be paid at end of original term of endorment, if the insured shall then be alive."

"Sec. 7899. **Rule of Payment on Commuted Policy.**—If the death of the insured occur within the term of temporary insurance covered by the value of the policy as determined in Section 7897, and if no condition of the insurance other than the payment of premiums shall have been violated by the insured, the company shall be bound to pay the amount of the policy, the same as if there had been no default in the payment of premium, anything in the policy to the contrary notwithstanding: **Provided, however,** that notice of the claim and proof of the death shall be submitted to the company in the same manner as provided by the terms of the policy within ninety days after the decease of the insured; **and provided also, that the company shall have the right to deduct from the amount insured in the policy the amount compounded at six per cent interest per annum of all the premiums that had been for-**

borne at the time of the decease, including the whole of the year's premium in which the death occurs, but such premiums shall in no case exceed the ordinary life premium for the age at issue, with interest as last aforesaid.''

These statutes were originally enacted in 1879 (Secs. 5983-5985, R. S. Mo. 1879) and the same sections were continued in force in the R. S. Mo. 1899 (Secs. 7897-7899) and said sections were continued in force (with the amendatory act, 1903, Laws 1903, p. 208) incorporated therein, in Sections 6151, 6153, R. S. Mo. 1919.

Missouri corporation laws in force when plaintiff in error obtained its license to do business in Missouri provides that every foreign corporation doing business in that state shall have and maintain a public office therein for the transaction of its business, and said section contains specifically the following language:

''And such corporation shall be subjected to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the general laws of this state, and shall have no other or greater powers'' (Sec. 1024, Vol. I, p. 337, R. S. Mo. 1899).

Hence, the above-quoted sections were as binding on plaintiff in error as on domestic insurance companies; and no local insurance company has complained or attacked said sections.

POINTS AND AUTHORITIES.

I.

We shall not refer to any constitutional question not presented to the Missouri courts, for neither petition for writ of error nor assignment of errors can be availed of to import questions into a case which the record does not show were raised and presented to the court below, and rulings asked thereon.

Wall v. Ches. & Ohio Ry. Co., 256 U. S. 125;
Mergenthaler Linotype Co. v. Davis, et al., 251 U. S. 256, 258, 259;
Hawassee Power Co. v. Carolina-Tenn. Co., 252 U. S. 341, 344;
Manhattan Life v. Cohen, 234 U. S., l. c. 134;
Haire v. Rice, 204 U. S. 291;
Hulbert v. Chicago, 202 U. S. 275;
Johnson v. New York Life Ins. Co., 187 U. S. 491;
Ansbro v. United States, 159 U. S. 695-698.

Hence it clearly appears that there is no federal question involved in this case.

The policy in suit is a Missouri contract, and being such, section 7896 Revised Statutes of Missouri, 1899, which was in force when said policy was issued and delivered, entered into and became

a supreme stipulation thereof, as much so as if fully copied therein. It is a constituent element of the policy and formed part consideration therefor.

New York Life Ins. Co. v. Cravens, 178 U. S. 389;
Equitable Life Society v. Clements, 140 U. S. 226;
Northwestern Life Ins. Co. v. McCue, 223 U. S. 234.

The validity of said section is not challenged or in any manner drawn in question by plaintiff in error, for it is not claimed that said section is itself unconstitutional or violative of any provision of the Constitution of the United States; on the contrary, the validity of the statute is admitted; but it is claimed that said section as amended after issuance of the policy by Laws of Missouri, 1903, page 208, applies to and governs the policy in suit and that because of said after-enacted amendatory act to require plaintiff in error to pay the policy would deny it the equal protection of the laws and deprive it of its property without due process of law, in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States. Such claim or assertion of a "federal question" is wholly insuf-

ficient to support either a writ of error or writ of certiorari.

Jett Bros. Co. v. City of Carrollton, 252 U. S. 1, 6;
Moore-Mansfield Co. v. Electrical Co., 234 U. S. 619;
Champion Lumber Co. v. Fisher, 227 U. S. 445;
Central Land Co. v. Laidley, 159 U. S. 103;
Balt. and Pot. Railroad v. Hopkins, 130 U. S. 210;
Lloyd v. Matthews, 155 U. S. 222, 227.

The validity of said section was challenged and presented to the Missouri court in New York Life v. Dodge, 246 U. S. 357 (see Dodge v. New York Life, 189 S. W. 610).

The contention of plaintiff in error amounts to this: That it has been denied the equal protection of the laws and deprived of its property without due process of law because the Supreme Court of Missouri refused to violate Section 10 of Article I of the Constitution of the United States by applying the ex post facto amendatory act found in Laws of Missouri, 1903, page 208. Said amendatory act could not be thus applied without denying rights to defendant in error guaranteed to her by the Constitution of the United States.

Bank of Minden v. Clement, 256 U. S. 126;
Alford v. New York Life Ins. Co., 280 Mo. 11.

And the Missouri courts, without exception, have decided that said amendatory act is inapplicable where, as here, the policy was issued before the amendment, although the loan agreement, as here, was made after its passage.

Liebing v. Mutual Life Ins. Co., 269 Mo. 509, 521, 522 (cases cited);
Gillen v. New York Life Ins. Co., 178 Mo. App. 89;
Paschedag v. Metropolitan Life Ins. Co., 155 Mo. App. 185.

Since plaintiff in error invokes said Section 7897, Revised Statutes, Mo., 1899, as amended in 1903, it cannot challenge its validity, for "a party cannot both assail and rely on a statute in the same proceeding."

Hurley v. Commission of Fisheries of Va. et al., 42 Sup. Ct. Rep. 83.

Said section is valid.

Cravens v. New York Life Ins. Co., 148 Mo. 583, affirmed 178 U. S. 389;
Horton v. New York Life Ins. Co., 151 Mo. 158;
Burridge v. New York Life Ins. Co., 211 Mo. 158.

Its constitutionality has been pronounced "a dead question."

Mun v. New York Life Ins. Co., 181 S. W. (Mo. App.) 609.

II.

The Supreme Court of Missouri did not deny the validity of the New York laws, but only held them inapplicable under the facts proven. Hence, faith and credit were not denied to the New York laws.

Smithsonian Institution v. St. John, 214 U. S. 19, 29;
Allen v. Allegheny Company, 196 U. S. 458, 464, 465;
Eastern Building and Loan Association v. Williamson, 189 U. S. 122;
Banhalzer v. New York Life Ins. Co., 178 U. S. 402.

The deliberate policy and loan contract in this case is "of too much solemnity to be brushed away by loose and inconclusive testimony," and they show that the whole transactions occurred in Missouri.

Northwestern Mut. Life Ins. Co. v. Nelson, 103 **U. S. 544, 548, 549.**

The general rule that parol evidence is inadmissible to vary, qualify, contradict, add to, or subtract from,

the absolute terms of a written contract, applies to policies and assignments in writing. The loan agreement itself establishes that it was consummated in Missouri.

McAleer v. United States, 150 U. S. 424.

Plaintiff in error was required and had authorized the superintendent of insurance of Missouri to acknowledge or receive service of process issued from any court in Missouri.. And had agreed that such service shall be taken and held valid (Section 7991, R. S. Mo., 1899).

Hence, it can be compelled by judicial process to pay its Missouri debts in that state as contracted.

Equitable Life Assurance Society v. Brown, 187 U. S. 308, 313.

And if plaintiff in error refused to make the loan in Missouri contra-distinguished from in New York, in accordance with the terms of the policy, and the statutes of Missouri which form the supreme stipulations of the policy, then it could have been compelled to do so with damages by action against it in Missouri courts.

Hubbard v. Equitable Life Assurance Society, 81 W. Va. 663, 4 A. L. R. 886, note 895;
Reilly v. Steinhart, 217 N. Y. 549.

And even if the Missouri court made a mistake in applying Missouri law, yet that "being purely a question of local common law, is a matter with which this Court is not concerned."

Kryger v. Wilson, 242 U. S. 171, 176 (cases cited).

The evidence in this case establishes and the trial and Supreme Court found that the loan agreement here is a Misouri contract (Liebing v. Mutual Life Ins. Co., 226 S. W. 897; Head v. N. Y. Life, 227 S. W. [Mo.] 437). The finding under the facts proven is correct, for the Court could not say that because plaintiff in error issued the check in New York that that constituted the contract and controlled and governed the legal status of the whole transaction.

Manhattan Life Ins. Co. v. Cohen, 139 S. W. (Tex. Civ. App.) 51, writ of error dismissed, 234 U. S. 123;

Haas v. Mutual Life Ins. Co., 90 Neb. 808, Ann. Cas. 1913B, 919 and note;

Lukens v. International Life Insurance Company, 269 Mo. 574, (citing and following New York Life v. Head, 234 U. S. 149);

Ins. Co. v. Stratton, 215 S. W. (Ky. C. A.) 416.

III.

There was no dispute on the facts in this case and the trial court was bound to direct a verdict for defendant in error. And in so doing the Court committed no error and deprived the plaintiff in error of no constitutional right.

11 Ency. of U. S. Supreme Court Reports, p. 933 and cases cited;
Iowa Cent. Life v. Iowa, 160 U. S. 389;
District of Columbia v. Moulton, 182 U. S. 576, 582;
McGuire v. Blount, 199 U. S. 142, 148;
Smith v. Glynn, 177 Southwestern 848, 850;
Davidson v. Hartford Life Ins. Co., 151 Mo. App. 561.

IV.

Neither under the laws of Missouri nor of New York is the loan agreement a contract independent of the policy, but is controlled by it, and is subsidiary thereto. And the same doctrine has been announced by the courts of other states. This is especially true under the peculiar wording of the policy here.

Liebing v. Mutual Life Insurance Co., 226 S. W. (Mo.) 897;

Burridge v. New York Life Ins. Co., 211 Mo. 158;
McCall v. International Life Ins. Co., 196 Mo. App. 318;
Gillen v. New York Life Insurance Co., 178 Mo. App. 89;
Christensen v. New York Life Ins. Co., 152 Mo. App. 551;
Dannhauser v. Wallenstein, 169 N. Y. 199;
Cole v. Knickerbocker Life Ins. Co., 63 How. Pr. (N. Y.) 442;
McDonnell v. Alabama Gold Life Ins. Co., 85 Ala. 401, 412-415;
Lewis v. New York Life Ins. Co., 181 Fed. 433.

Of course, the loan agreement is a personal obligation of the insured and defendant in error, who the evidence in this case shows, were solvent and would have repaid the same upon notice of maturity.

Life Assurance Soc. v. De Lisle, 194 Mo. App. 42;
Gillen v. New York Life Ins. Co., 178 Mo. App. 89;
Smith v. Mutual Benefit Life Ins. Co., 173 Mo. 329.

The word "will," as used in the policy, is mandatory and excludes the idea of discretion.

Russell et al. v. Harrison, Secy. of State, 33 Okla. 225;
Scally v. W. T. G. & Co., 11 Cal. App. 138.

V.

Even if the laws of New York were applicable and controlling, yet the Missouri trial court would be bound to direct a verdict for defendant in error and the Missouri Supreme Court would be bound to affirm the judgment, for reasons, amongst which are the following:

(1) Because under the New York laws the loan agreement is not a contract independent orf the policy, but is controlled by same and is subsidiary thereto.

Cole v. Knickerbocker Life Ins. Co., 63 How. Pr. (N. Y.) 442;
Dannhauser v. Wallenstein, 169 N. Y. 199.

(2) Because under the terms of the loan agrement and the facts in this case the applicable New York decisions are:

Toplitz v. Bauer, 161 N. Y. 325;
Bailey v. American Deposit Co., 52 App. Div. (N. Y.) 402, affirmed 165 N. Y. 672;
Stevens v. Mutual Life, 227 N. Y. 524, is inapplicable.

(3) Because the law in force and pleaded by plaintiff in error is Section 16, Chapter 218 of New York laws, 1897. And this section makes Missouri laws ap-

plicable and controlling under the facts proven and admitted in this case.

(4) Because under New York law the loan agreement here is, under the facts proven, usurious and illegal.

Secs. 370 and 373, Chap. 25, Volume II, Consolidated Laws of New York.

And foreign law contravening public policy, especially public policy evidenced by statute, will not be administered or enforced.

Grosman v. Union Trust Co., 228 Fed. 610, affirmed 245 U. S. 412;
Central Land Co. v. Laidley, 159 U. S. 103, 111;
Meachem v. Jamestown, F. & C. R. R. Co., 211 N. Y. 346;
Marshall v. Sherman, 148 N. Y. 9;
Emery v. Burbank, 163 Mass. 326;
Dougherty v. American McKenna Co., 255 Ill. 369;
Parker-Harris Co. v. Stephens, 205 Mo. App. 373.

Courts "will never give effect to a foreign law when to do so would prejudice the state's own rights or the rights of its citizens."

5 R. C. L., p. 911 (cases cited);
1 R. C. L. (Supp.), pp. 1549, 1550 (cases cited).

The laws of New York cannot, without denying rights to defendant in error guaranteed under the State and Federal Constitutions, be applied in this case, for the authority of the New York laws cannot be extended into the State of Missouri so as to control contracts there made between citizens thereof, and a foreign corporation transacting business therein.

New York Life v. Head, 234 U. S. 149;
New York Life v. Dodge, 246 U. S. 357;
American Fire Ins. Co. v. King Lumber Co., 250 U. S. 11 (cases cited, including Head case);
Hooker v. California, 155 U. S. 648.

Neither misconstruction nor errors of law present reviewable federal questions.

King v. West Virginia, 216 U. S. 92, 101;
Bonner v. Gorman, 213 U. S. 86, 91.

This Court accepts the construction of state courts.

Knights of Pythias v. Meyer, 198 U. S. 508, 520;
West v. Louisiana, 194 U. S. 258, 261.

The Missouri courts found as a matter of fact that the loan contract here was entered into in Missouri.

And "what is matter of fact in the state court is matter of fact in this court upon review."

Western Indemnity Co. v. Rupp, 235 U. S. 261, 275; cases cited;
Eastern B. & L. Association v. Ebaugh, 185 U. S. 114, 121.

And later the same Court held that the loan agreement in the instant case is a Missouri contract.

Head v. New York Life, 227 S. W. (Mo.) 429, 437.

It was not necessary to the determination of this case that the Supreme Court of Missouri decide the supposed federal questions; and hence, the decision of that Court resting, as it does, on non-federal grounds adequate to support it, is not reviewable in this court.

Municipal Securities Corp., 246 U. S. 63;
Bilby v. Stewart, 246 U. S. 255;
Adams v. Russell, 229 U. S. 353;
Southern Pac. Co. v. Schuyler, 227 U. S. 601, 610;
Arkansas Southern R. Co. v. German Natl. Bank, 207 U. S. 270;
McLaughlin v. Fowler, 154 U. S. 663;
California Powder Works v. Davis, 151 U. S. 389.

The liberty clause of the national Constitution refers to natural, not artificial, persons.

Northwestern Life Insurance Co. v. Riggs, 203 U. S. 243;
Western Turf Association v. Greenberg, 204 U. S. 359.

Likewise the immunity clause.

Selover, Bates & Co. v. Walsh, 226 U. S. 112, 126.

"The settled doctrine is that the contract clause applies only to legislation subsequent in time to the contract alleged to have been impaired."

Munday v. Wisconsin Trust Co., 252 U. S. 499, 503.

"The significance of the fact that this suit was brought in a Missouri court must not be overlooked."

Dissenting opinion in New York Life v. Dodge, 246 U. S., l. c. 384; cases cited.

VI.

The loan was negotiated with and the policy was delivered to Dwight H. Payson, the plaintiff in error's representative at Macon, Missouri, who had ample authority to make said loan and receive said policy.

Hence, the loan agreement and pledge, even if contracts independent of the policy, are Missouri contracts and governed by Missouri law, for in assignment and pledge contracts, the law of the place of delivery of the thing assigned or pledged or the owner's domicile controls.

Manhattan Life Ins. Co. v. Cohen, 139 S. W. (Texas Civ. App.) 51, writ of error dismissed, 234 U. S. 123;
Hatch v. Oil Co., 100 U. S. 124;
Black et al. v. Zacharie & Co., 44 U. S. (3rd How.) 483;
Owen v. Miller and others, 10 Ohio St. 136, 142;
Noble v. Smith, 6 R. I. 446, 449;
Rail v. Little Falls Lumber Co., 47 Minn. 422;
Henline v. Hall, 4 Ind. 189;
Jenkins, Admr., etc., v. Jarrett, 70 N. C. 255;
Phillips, by his guardian, v. Moor, 71 Me. 78;
Falls v. United States Savings, Loan & Building Co., 97 Ala. 417;
Washington Investment Ass'n v. Stanley, 38 Ore. 319, 341, 342 (cases cited).

The relation between a bank and its depositor is that of debtor and creditor, and not principal and agent.

When the bank received the check indorsed by insured the title to the check passed from him to the bank, so that then and there the bank became the absolute owner of the check.

And the fact that the bank, in case it failed to collect the check, had the right to charge the amount of it back against the account of insured could not prevent the bank's acquiring title to the check by the indorsement of insured. This right to charge back affects neither title nor absolute ownership of the bank.

Ayres v. The Farmers & Merchants Bank, 79 Mo. 421.

And the same rule obtains in the State of New York.

Metropolitan National Bank v. Loyd, 90 N. Y. 530.

VII.

The policy, pledge and loan agreement are Missouri contracts, notwithstanding the stipulation in the policy and loan agreement that the sum insured and the amount of the loan were to be paid in the City of New York. This is especially true since both instruments are non-negotiable. For it is elementary that "a contract void by the law of the place where made, even though it is to be performed in another state by the laws of which it would be valid, is void everywhere, as the courts of no state will enforce the void contracts of another state."

In other words, a void contract has neither a place of performance nor a forum.

Liverpool & G. W. Steam Co. v. Phoenix Ins. Co., 129 U. S. 397;
Knights Templars & Masonic Mut. Aid Ass'n v. Green, 79 Fed. 461;
2 Elliott on Contracts, sec. 1202 (cases cited);
9 Cyc, pp. 672-674 (cases cited);
Millard v. Brayton, 177 Mass. 533-537 (cases cited);
Union Nat. Bank v. Chapman, 169 N. Y. 538;
C. M. Ins. Co. v. Force et al., 142 N. Y. 90;
Staples v. Nott, 128 N. Y. 403;
Burr v. Beckler, 264 Ill. 230;
Brown v. Amer. F. Co., 31 Fed. 516;
Acme Food Co. v. Kirsch, 166 Mich. 433;
Kennedy v. Cochrane, 65 Me. 594;
Bailey v. Hope Ins. Co., 56 Me. 474, 479, 480;
Clark v. Southern Railway Co., 69 Ind. App. 697, 731 (authorities cited);
Exchange Bank v. Hubbard, 62 Fed. 112;
Potter et al. v. The Majestic, 60 Fed. 624;
American Freehold Land Mortgage Co. v. Sewell, 92 Ala. 163;
Union Central Life Ins. Co. v. Woods, 11 Ind. App. 335, 348, 349;
Pacific Building Co. v. Hill, 40 Or. 280;
Reed v. Western Union Tel. Co., 135 Mo. 661;
Wm. Glenny Glass Co. v. Taylor, etc., 99 Ky. 24, 28, 29.

VIII.

The law of the place of performance always yields to the lex fori and lex loci contractus. And even if the loan agreement was accepted by plaintiff in error in New York, yet notice of acceptance and payment in Missouri of part of the proceeds of the loan by the plaintiff in error's Macon, Missouri, representative to insured were conditions precedent, and, hence, of itself makes the loan agreement a Missouri contract.

Crohn v. U. C. T., 170 Mo. App. 273;
Perry v. Insurance Company, 67 N. H. 291, 294, 295;
Heiman v. Ins. Co., 17 Minn. 153;
Ins. Co. v. Stratton, 215 S. W. (Ky. C. A.) 416.

IX.

The Head and Dodge cases are in many respects unlike the case at bar. A marked distinction is that the policies and loan agreements in the Head and Dodge cases made the New York laws applicable and controlling, while in the instant case, neither the policy nor the loan agreement make said New York laws either applicable or controlling. Therefore the rule

successfully presented by plaintiff in error in the following cases applies:

Mutual Life Insurance Co. v. Cohen, 179 U. S. 262;
Mutual Life Insurance Co. v. Hill, 193 U. S. 551;
Mutual Life Insurance Co. v. Dingley, 184 U. S. 695, reversing 100 Fed. 408;
Rose v. Mutual Life Insurance Co., 240 Ill. 45;
Mutual Life Insurance Co. v. Hathaway, 106 Fed. 815.

Of course, the same rule obtains in Missouri.

Lange v. New York Life Insurance Co., 254 Mo. 488 (citing and following Mutual Life v. Hill, 193 U. S. 551).

X.

Federal question must appear in the pleadings, not by mere inference, but by distinct averments according to the rules of good pleading.

Hull v. Burr, 234 U. S. 712, 720;
Shulthis v. McDougal, 225 U. S. 561, 569;
Bankers Casualty Co. v. Minn. St. P., etc., Ry., 192 U. S. 371, 383;
Spencer v. Duplan Silk Co., 191 U. S. 526, 530;
Erie Railroad Co. v. Purdy, 185 U. S. 148;
Morrison v. Watson, 154 U. S. 111;
Miller v. Texas, 153 U. S. 535.

And must be set up in the time provided in the state court.

Godchaux Co. v. Estopenal, 251 U. S. 179, 181 (cases cited).

The alleged federal question in this case was not set up properly nor in the time provided by Missouri practice, for reasons, among which are the following:

(a) Plaintiff in error's averment that to require it to pay the policy will violate certain named sections of the State and National Constitutions is entirely insufficient to raise a constitutional question, especially to challenge the constitutionality of Section 7897, R. S. Mo., 1899, for the constitutional inhibition is directed solely against certain legislative acts and not against erroneous judgments.

Stegall v. Am. Pigment & Chemical Co., 263 Mo. 719;
Kemper Mill & Elevator Co. v. Railway, 178 S. W. (Mo.) 502;
Powder Mfg. Co. v. Railroad, 196 Mo., l. c. 668 and 670;
Hilgert v. Barber Asphalt Pav. Co., 173 Mo. 319;
Woody v. Railway, 173 Mo. 547;
Kansas City v. Baird, 163 Mo. 196;
Hulett v. Railway, 145 Mo. 36, 37;
Mining Co. v. Casualty Co., 161 Mo. App., l. c. 194, 195;

Paving Co. v. O'Brien, 128 Mo. App. 285;
N. O. Waterworks v. La. Sugar Co., 125 U. S. 18;
N. O. Waterworks v. La., 185 U. S., l. c. 350, 351.

(b) A constitutional question is a grave one and hence must be lodged at the first opportunity, or it will be deemed to have been waived. "If it can be appropriately and naturally raised in the pleadings, and thereby lodged in the record proper, such is the time and place to raise it."

Funk v. Kansas City, 197 S. W. (Mo.) 343;
Deiner v. Sutermeister, 266 Mo., l. c. 514, 515;
Speer v. Railroad, 264 Mo. 265;
Miller v. Connor, 250 Mo. 677;
International Text Book Co. v. Brennan., 178 S. W. (Mo.) 82;
Smith v. Glynn, 177 S. W. (Mo.) 848;
George v. Railroad, 249 Mo. 199;
Milling Co. v. Blake, 242 Mo., l. c. 31, 32;
Ross v. Grand Pants Co., 241 Mo. 296;
Wooley et al. v. Mears et al., 226 Mo. 41;
Hartzler v. Railway, 218 Mo. 562;
Lohmeyer v. Cordage Co., 214 Mo. 685;
Carradine v. Ford, 195 Mo. App. 684;
Hayes v. Hogan, 180 Mo. App. 237.

(c) Apart from exceptional cases (in which the instant one is not included) the constitutional question cannot be raised for the first time either in the in-

structions, in the motion for a new trial or in th
motion in arrest. The question must be raised in th
pleadings and kept alive in the instructions and mo
tions, otherwise the issue will be considered waive
and abandoned.

Mercantile Trust Co. v. Lyon et al., 195 S. W
(Mo.) 1032;
State ex rel. v. Railroad, 262 Mo., l. c. 735;
Dubowsky v. Binggeli, 258 Mo., l. c. 201, 202
Pickel v. Pickel, 243 Mo., l. c. 666;
Howell v. Sherwood, 242 Mo., l. c. 540;
State v. Bamma, 215 Mo., l. c. 103-105;
Shell v. Railway, 202 Mo. 339;
Whitsett v. City of Carthage, 184 S. W. (Mo
App.), l. c. 1187;
Railroad v. Adams, 180 U. S., l. c. 38, 39.

XI.

No new issues can be made nor new defenses as
serted after the case comes down from the reviewin
court for retrial. Before this case went to trial th
first time, the defense founded on the laws of New
York was open to plaintiff in error within the legiti
mate scope of the pleadings. It was too late on re
trial to invoke the defense founded on the laws o

New York. Such is the well-established doctrine of this court.

Railway Company v. McCarthy, 96 U. S. 258, 267, 268;
Louis. & Nash. R. R. v. Higdon, 234 U. S. 592 (cases cited).

And the same rule obtains in Missouri.

Bange v. Legion of Honor, 153 Mo. App. 154, 167, 168;
State ex rel, Bankers Life Co. v. Reynolds, 277 Mo. 14, 21, 22.

And the same rule obtains also in the sister states.

Hutchings v. Railway, 98 Kans. 225, affirmed 248 U. S. 363;
In re Estate of Cook, 143 Iowa 733;
Mantle v. Dabney, 47 Wash. 394;
Barrett v. McAlister, 35 W. Va., l. c. 116, 117;
Williams et al. v. Banks et al., 19 Md. 22, l. c. 36;
Bassett v. Shepardson, 57 Mich. 428;
City of Louisville v. Muldoon, 20 Ky. Law Rep. 1576;
Sears' Ex'or v. Marshall, 83 Va. 383;
State v. Board of County Commissioners, 60 Neb. 566, l. c. 570;
Murphy v. Plankinton Bank, 20 S. D. 178;
Gillespie v. Fulton Oil Co., 244 Ill. 9. l. c. 14;
Michael v. Ins. Co., 10 La. Ann. 737;

Ebelhar v. German-American Security Co.'s Assignee, 119 S. W. (Ky. C. of A.) 220;
Wood v. Kerkeslager, 227 Pa. 536;
Brewster v. Meng, 76 Neb. 560;
Hook v. Richeson et al., 115 Ill., l. c. 445;
Butler v. Thompson, 52 W. Va. 311;
McAllister v. Clark, 33 Conn. 252;
Continental Casualty Co. v. Semple, 112 S. W. (Ky. C. of A.) 1122;
In re Quaker Realty Co., 127 La. 207;
Ingold v. Symonds, 134 Iowa 206.

Upon the death of the insured and until the case came down for retrial the first time, the defendant construed the policy, pledge and loan agreement to be Missouri contracts, and having so interpreted its own contracts on principle and authority, it is bound thereby.

Andrus v. Ins. Co., 168 Mo., l. c. 166, 167;
The St. Louis Gas Light Co. v. City of St. Louis, 46 Mo. 121;
Rogers & Miller v. Indemnity Co., 189 Mo. App. 82, l. c. 90;
Fuller Brothers v. Fidelity & Casualty Co., 94 Mo. App. 490;
Boettger v. Roehling, 74 Mo. App. 256, l. c. 264, 265.

It was a departure from "LAW TO LAW;" that is, change from Missouri law in its amended answer to

New York law in its answer to second amended petition, which is a fatal variance.

Union Pacific Railway v. Wyler, 158 U. S. 285 (cited and followed in United States v. Dalcour, 203 U. S. 408, 422, 423; Moliter v. Railroad, 180 Mo. App. 84, 88 and Newberry v. Railroad, 271 Fed. 117, 119).

Where a petition is dismissed (except "without prejudice") it will be presumed that the merits were considered and the judgment is final. And in this case the petition was unconditionally dismissed on first trial.

2 Black on Judgments (2nd Ed.), Sec. 27 (cases cited);

2 Black on Judgments (2nd Ed.), Sec. 722 (cases cited);

Pond v. Huling, 125 Mo. App., l. c. 482-483 (cases cited).

Upon the same principle the doctrine of res adjudicata is applied to direct reversals, without remanding, where all the facts have been considered and passed upon.

Schmelzer v. Furniture Co., 252 Mo. 12;
Strottman v. Railroad, 228 Mo. 154.

Plaintiff in error in its amended answer upon which the case went to trial the first time admitted that the

non-forfeiture statute of Missouri was applicable, and the Missouri Supreme Court decided that said statute "disposes of the whole matter"; and plaintiff in error should not be permitted to introduce a new defense contradictory to the original defenses, especially since the same is obviously for the purpose of avoiding the matters decided on the first appeal.

Lilly v. Menke, 143 Mo. 137;
Harrison's Admr. v. Hastings, 28 Mo. 346;
Mantle v. Dabney, 47 Wash. 394.

Neither should an amendment be allowed where the proof required to sustain it would have to be essentially different from the proof required to sustain the original pleading.

Scovill v. Glasner, 79 Mo. 449 (cases cited);
Maloney v. Real Estate B. & L. Ass'n, 57 Mo. App., l. c. 390, 391.

XII.

Before this action was instituted, the plaintiff in error put non-liability on the ground that "there is no decision of the Supreme Court of Missouri conclusively deciding the points arising in the present case," and upon that ground alone. The New York law was not named as a defense. And if there is any proposition more firmly established than any other, it is that "An insurance company, when sued upon a

policy, cannot, after the beginning of suit, make any objections to paying the loss that are different from or additional to those which it stated before."

The same rule applies in other cases.

Shearlock v. Mutual Life, 193 Mo. App. 430 (cases cited);
Castner v. Ins. Co., 50 Mich. 273;
Wolf v. District Grand Lodge, 102 Mich. 23;
Brink v. Ins. Co., 80 N. Y. 108;
Smith v. Ins. Co., 107 Mich. 620;
Taylor v. Columbian League, 135 Mich. 231;
Ins. Co. v. Allen, 128 Ala. 451;
Snyder v. Mystic Circle, 122 Tenn. 248;
Ins. Co. v. Waugh, 60 Neb. 348;
McCormick v. Ins. Co., 163 Pa. 184;
Western & A. Pipe Lines v. Ins. Co., 145 Pa. 346;
Mitchell v. B. of L. F. & E., 103 Neb. 191;
Ins. Co. v. Elliott, 60 Ind. App. 112;
Ins. Co. v. Ray, 196 Ala. 425;
Ward v. Ins. Co., 69 Ore. 347;
Milling Co. v. Ins. Co., 127 Iowa 314;
Jacobs v. Mexico Sugar & Refining Co., 115 App. Div. (N. Y.) 499;
Strasburger & Co. v. Bonwit, 174 App. Div. 215-217.

"He who did not speak, when he should have spoken, shall not be heard now that he should be silent."

Quinlan v. Keiser, 66 Mo., l. c. 605;
Ins. Co. v. Grove, 215 Ill. 299.

"Where one relies for his right of recovery, or defense upon the law of another state, as declared by the adjudicated precedents of its courts, the decisions relied upon must be both pleaded and proven." Plaintiff in error pleaded no New York decisions.

Otto v. Pryor, 193 S. W. (Mo. App.) 28;
Lillard v. Lierley, 200 Mo. App. 140;
Sterling v. Parker-Washington Co., 185 Mo. App. 192;
Ginnochio v. Railroad, 155 Mo. App. 163.

And the allegations in plaintiff in error's answer concerning the common and unwritten law of the State of New York, is "simply the averment of a legal conclusion, not the statement of issuable facts; not, therefore, traversable or demurrerable, and is treated as no statement at all."

Gibson v. Railroad, 225 Mo., l. c. 482 (cases cited).

XIII.

The stipulation in the loan agreement for forfeiture and confiscation of the policy for nonpayment of the loan is void. Such stipulations have been denounced as void under the common law by

the courts of the sister states; and they are null, too, under the civil and Roman laws.

Luckett v. Townsend, 3 Tex. 119, 49 Am. Dec. 723 (and note);
Stephens v. Sherrod, 6 Tex. 294, l. c. 301;
Smith v. Quartz Mining Co., 14 Cal. 242;
Brother v. Saul, 11 La. Ann. 223;
4 Kent's Comm., Star pages 139-140;
Story's Comm. Bailments (9th Ed.), Secs. 345, 346;
Hughes v. Johnson, 38 Ark. 285;
Vickers v. Battershall, 32 N. Y. Supp. 314;
Mutual Life v. Twyman, 122 Ky. (cases cited);
Helm Com. Co. v. Albers Com. Co., 244 Mo. 38;
Greer v. Lafayette County Bank, 128 Mo. 559;
Wood v. Matthews, 73 Mo. 477;
Wilson v. Drumrite and Vaughn, 21 Mo. 325;
Ins. Co. v. Evans, 136 Ky. 391;
Ins. Co. v. Grigsby, 10 Bush. 310;
Ins. Co. v. Van Meters, Admr., 137 Ky. 4;
Drury's Admx. v. Ins. Co., 115 Ky. 681;
Ins. Co. v. Baker, 85 Ill. 410;
Nashville Trust Co. v. First Nat. Bank, 123 Tenn. 617;
Livingston v. Story, 36 U. S. 351;
Groeltz v. Cole, 128 Iowa 340;
Ins. Co. v. Curry Bros., 115 Ky. 100;
McEachern v. Ins. Co., 15 Ga. App. 222.

In the absence of statute, the pledgee can not confiscate the pledged property. Indeed, he is bound to sell it, and he cannot even become a purchaser at the sale.

Easton v. German-American Bank, 127 U. S. 532;
Pauley v. State Loan, Etc., Co., 165 U. S. 606.

XIV.

And in the absence of the Missouri non-forfeiture statutes the defendant in error is entitled to recover for the following other and further reasons, namely:

(a) **The policy contains no forfeiting stipulation for failure to pay a loan and the Court will not supply one.**

Tetley v. McElmurry, 201 Mo., l. c. 394;
Haas v. Ins. Co., 84 Neb. 682 (28 cases cited);
Cole v. Ins. Co., 63 How. Pr. Rep. (N. Y.) 442;
Mutual Life v. Allen, 212 Ill. 134;

(b) **On the contrary the policy stipulates: "That in any settlement of this contract all outstanding indebtedness hereon to the company must be paid." While the loan agreement provides that plaintiff in error may cancel and confiscate the policy for nonpayment of the loan. Here a clear repugnancy which no rule of construction can reconcile.**

Hence, under the well-settled rule, force must be given to the terms of the policy that sustain, rather than to the terms of the loan agreement which would forfeit the policy, because forfeitures are not favored by the law.

Ins. Co. v. Doster, 106 U. S. 30;
Stark v. Ins. Co., 176 Mo. App. 574;
Dibert v. D'Arcy, 248 Mo. 617;
Gardner v. Ins. Co., 5 Fed. 430;
Ins. Co. v. Dutcher, 95 U. S. 269;
Bruce v. Ins. Co., 58 Vt. 253;
Eddy v. Ins. Co., 65 N. H. 27;
Ins. Co. v. Wallace, 93 Ind. 7;
Ins. Co. v. Little, 56 Ind. 504;
Ohde v. Ins. Co., 40 Ia. 357;
Ins. Co. v. Fort's Adm'r., 82 Ky. 269;
Symonds v. Ins. Co., 23 Minn. 491;
Cowles v. Ins. Co., 63 N. H. 300;
Cole v. Ins. Co., 63 How Pr. (N. Y.) 442;
Hull v. Ins. Co., 39 Wis. 397;
Ins. Co. v. Ross, 63 Ga. 199;
Ins. Co. v. Wright, 126 Fed. 82;
Ins. Co. v. Bonner, 36 Ohio St. 51;
Fithian v. Ins. Co., 4 Mo. App. 386;

(c) **The incontestability stipulation eliminates all defenses not excepted in that provision and non payment of loans is not excepted.**

Harris v. Ins. Co., 248 Mo. 304 (cases cited);
2 Bacon (4th Ed.), Sections 447, 448;

Arnold et al. v. Equitable Assur. Soc., 228 Fed. 157 (cases cited);
Ins. Co. v. McGinnis, 180 Ind., l. c. 16, 17 (cases cited);
Loyal Americans of the Republic v. Mayer, 137 Ill. App. 574;
Ins. Co. v. Robinson, 104 Ga. 256;

(d) **Neither the loan agreement nor the rules of the plaintiff in error form a part of the policy because not indorsed on the policy, set forth therein, nor attached thereto. There is no reference whatever to the loan agreement in the policy.**

Miller v. Ins. Co., 168 Mo. App. 330;
McCarthy v. Ins. Co., 46 Nat. Corp. Rep. 287;
Snyder v. Ins. Co., 13 Wend. (N. Y.) 92;
1 Joyce (2nd Ed.) 191-198 (cases cited).

With respect to loans the promise was that they would be made in conformity with the plaintiff in error's rules in force when the policy was issued. Therefore, it is upon those rules—and those rules alone—that the right of forfeiture for non-payment of a loan can be predicated. The plaintiff in error failed to plead or prove said rules, although where a forfeiture is relied on its conditions must be pleaded and proven with technical accuracy and

completeness. The loan agreement cannot enlarge on the policy.

Burchard v. W. C. T. A., 139 Mo. App. 606 (cases cited);
Chadwick v. Triple Alliance, 56 Mo. App. 463;
Bozeman's Admr. v. Ins. Co., 130 Ky., l. c. 584;
Francis v. Ins. Co., 243 Pa. 380;
Lingenfelder v. Brewing Co., 103 Mo. 578;
Pfeifer v. Kingsland, 25 Mo. 66;
Macfarland v. Heim, 127 Mo. 327;
Montgomery v. Anchley, 82 Mo. 126;

(e) Under the policy, the insured was entitled to his "distributive share of surplus," and it is the rule not now to be questioned that the "surplus" must be valued and applied in buying extended insurance for lapsed policies in force three years or longer in the same way that the "reserve" of the policy is required to be valued and applied. This must be done at the date of lapse in spite of any stipulation in the policy to the contrary notwithstanding.

Policies cannot be forfeited or confiscated for the non-payment of loans equal to the inadequate amount designated "customary cash surrender value."

Peak v. Mutual Benefit Life, 172 Ky. 245;
U. S. Life v. Spinks, 126 Ky. 405;
Emig's Admr. v. Ins Co., 127 Ky. 588.

(f) Neither the cash nor the full reserve values of policies are their true values. They do not constitute even the minimum, not to mention the speculative, values of policies.

Smith v. Mutual Benefit, 173 Mo., l. c. 340;
Palmer v. Mutual Life, 121 Minn. 395;
Toplitz v. Bauer, 161 N. Y. 325;
Bailey v. Am. Deposit Co., 52 App. Div. (N. Y.) 402, affirmed 165 N. Y. 672.

(g) And this, of itself, renders the pledge invalid, and the transaction usurious.

Sections 6492-6496 R. S. Mo., 1919;
Sections 370-373 of Ch. 25 of Vol II, Consolidated Laws of N. Y.

XV.

The Court committed no error in refusing to afford plaintiff in error an opportunity to apply to the Supreme Court of Missouri for a writ of mandamus.

State ex rel. v. McQuillan, 262 Mo. 256 (cases cited).

And the Court committed no error in overruling plaintiff in error's application for a change of venue

or in retaining jurisdiction of the case after the application had been filed.

Barrington v. Missouri, 205 U. S. 483;
State v. Lehman, 182 Mo. 424;
State v. Blitz, 171 Mo. 530;
Junior v. Electric Light and Power Co., 127 Mo. 79;
McArthur v. Elevated Railway Co., 123 Mo. App. 503.

XVI.

There are many propositions of law which we omit referring to here, because we believe they are questions to be decided by the state court.

BRIEF OF THE ARGUMENT.

I.

We shall not refer to any constitutional question not presented to the Missouri courts, for neither petition for writ of error nor assignment of errors can be availed of to import questions into a case which the record does not show were raised and presented to the court below and rulings asked thereon.

Thus, in **Manhattan Life v. Cohen**, 234 U. S., l. c. 134, this Court said:

> **"The assignments of errors, however, assert violation of rights under the constitution in many particulars, but none especially with references of this court in treating the sales of the policies as Texas contracts and refusing to apply the Georgia law, which admittedly differed fundamentally from that of Texas. It is elementary that a Federal question must not be imported into a record for the first time by way of assignments of error made for the purpose of review by this court."**

In **Dodge v. New York Life Ins. Co.**, 189 S. W. (Mo. App.), l. c. 610, the Court wrote that:

> **"It is argued by the appellant that Section 7897, R. S. is unconstitutional and void."**

Hence, it is obvious that in that case the validity of said section was presented to the Missouri court before the assignment of errors or petition for writ of error were prepared. Indeed, it was lodged timely and well in the pleadings.

THERE IS NO FEDERAL QUESTION INVOLVED IN THIS CASE.

That the policy in suit is a Missouri contract is not now a debatable proposition. And being a Missouri contract the non-forfeiture statutes then in force entered into, and became part thereof, as much so as if copied therein.

Cravens v. Ins. Co., 148 Mo. 583, involved the Missouri non-forfeiture statutes, and the Court held, amongst other things, that: **"A statute with respect to the subject matter in force at the time a contract is entered into within this state, became a part of he contract, as much so as if copied into it."** In note in 104 Am. St. Rep. 486, it is said concerning the Cravens' decision:

> **"This is an intensely interesting case containing an exhaustive review of the authorities and was affirmed by the Supreme Court of the United States, in New York Life Ins. Co. v. Cravens, 178 U. S. 389."**

And we may add that the Cravens' decision by this Court and the one by the Missouri court have been cited approvingly in cases too numerous to cite here.

In **Equitable Life Soc. v. Clements,** 140 U. S. 226, with respect to the Missouri non-forfeiture statutes, the Court held that:

> **"The Revised Statutes of Missouri of 1879, Sections 5983-5986 establish a rule of commutation upon default in payment of premium after two premiums have been paid on a policy of life insurance, which cannot be varied or waived by express provisions in the contract."**

If said statutes cannot be varied or waived by express provisions in the policy, then how can same be done by policy loan agreement? Is not the loan agreement provision **"an ineffectual attempt to evade and nullify the clear words of the statute?** (Equitable Life v. Clements, supra, 234.)

The making of the insurance contract in Missouri between the company and a resident of Missouri impressed upon the transaction the then existing laws of Missouri governing such transactions. Can everything including statutes which are supreme stipulations of policies be wiped out by loan agreements? If so, what value are state statutes?

(See, also, **Northwestern Life v. McCue,** 223 U. S. 234.)

THE PLAINTIFF-IN-ERROR PRESENTED THREE ALLEGED CONSTITUTIONAL QUESTIONS TO THE MISSOURI COURTS, ONE OF SAID QUESTIONS IS THAT ALTHOUGH THE POLICY IN THE CASE AT BAR WAS ISSUED ON THE 29th DAY OF SEPTEMBER, 1901, YET AN AMENDATORY ACT OF 1903 SHOULD BE APPLIED AND MADE CONTROLLING IN ITS BEHALF. The plaintiff-in-error's averments on this question are found on page 11 of the transcript of the record, and in part read:

> **"Defendant therefore states that Section 7897, Revised Statutes of Missouri, 1899, as amended by said act of 1903, applies to and governs the policy in suit, and that the defendant is entitled to deduct from three-fourths of the net value, calculated as above stated, the total amount of the indebtedness to the company on said policy at the date of lapse, and that to require the defendant to pay this policy will be to deny to the defendant the equal protection of the laws and to deprive the defendant of its property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and Section 30 of Article II of the Constitution of the State of Missouri."**

We call attention to the fact that the validity of Section 7897, R. S. Mo. 1899, is not challenged or in any manner drawn in question by the plaintiff in

error, for it is not claimed that said section is itself unconstitutional and violative of any provision of the Constitution of the United States; on the contrary, the validity of the statute is admitted; but it is claimed that said section as amended after issuance of the policy by Laws of Missouri, 1903, page 208, applies to and governs the policy in suit and that because of said after-enacted amendatory act to require plaintiff in error to pay the policy would deny it the equal protection of the laws and deprive it of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Such claim or assertion of a "federal question" is wholly insufficient to support either a writ of error or writ of certiorari.

In **Jett Bros. v. City of Carrollton,** 252 U. S. 1, 6, quoting approvingly from **Railroad v. Hopkins,** 130 U. S. 210, this Court said:

> **"Whenever the power to enact a statute as it is by its terms, or is made to read by construction, is fairly open to denial and is denied, the validity of such statute is drawn into question, BUT NOT OTHERWISE. And the Chief Justice added, upon the authority of Millingar v. Hartuee, 6 Wall. 258, 261, 262, that the word 'authority' stands upon the same footing."**

And the Court in the **Jett** case refers approvingly to **Chapman Lumber Co. v. Fisher,** 227 U. S. 445, 450, 451, where the question is also fully discussed (p. 6).

In **Central Land Co. v. Laidley,** 159 U. S., l. c. 110, the Court said:

> **"The statute of West Virginia is admitted to have been valid, whether it did or did not apply to the deed in question; and it necessarily follows that the question submitted to and decided by the state court was one of construction only, and not of validity. If this court were to assume jurisdiction of this case, the question submitted for its decision would be, not whether the statute was repugnant to the Constitution of the United States, but the highest court of the state has erred in its construction of the statute."**

In **Railroad v. Hopkins,** 130 U. S. 210, the Court held that:

> **"The validity of a statute is drawn in question when the power to enact it is fairly open to denial and is denied; BUT NOT OTHERWISE."**

When did plaintiff-in-error present such question in this case to any Missouri court?

In **Lloyd v. Matthews,** 155 U. S. 222, 227, the Court wrote:

> **"And it is settled that, under such circumstances, where the validity of a state law is not drawn in question, but merely its construction, no federal question arises."**

Furthermore, since plaintiff-in-error invokes the Missouri statute as amended in 1903, it cannot challenge its validity, for **"a party cannot both assail and rely on a statute in the same proceeding."** This was decided by this Court as recently as October, 1921, in **Hurley v. Commission of Fisheries,** 42 Sup. Ct. Rep. 83.

We submit that the Court did not deny to plaintiff-in-error the equal protection of the law, nor deprive it of its property without due process of law because the Court failed to apply said amendatory act to an ante-dating policy.

Indeed, plaintiff in error"s constitutional question is this: That it has been denied constitutional rights because the Supreme Court of Missouri failed to violate **Section 10 of Article I of the Constitution of the United States** by applying the ex post facto amendatory act found in Laws of Missouri 1903, page 208. Of course said amendatory act could not be applied in this case without denying rights guaranteed to defendant in error by the Constitution of the United States.

On April 11, 1921, this Court in **Bank of Minden v. Clements,** 256 U. S. 126, upon the authority of

many cases held that a law applied to antedating policies was invalid as applied to said policies because in conflict with Article I, Section 10, of the Constitution. In the course of the opinion this Court said:

> **"And in Planters' Bank v. Sharp, 6 How. 301, 327, opinion by Mr. Justice Woodbury: 'One of the tests that a contract has been impaired is, that its value has by legislation been diminished. It is not, by the Constitution to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation, dispensing with any part of its force"** (l. c. 128, 129; cases cited).

In **Alford v. N. Y. Life Ins. Co.**, 280 Mo. 11, the Court considered the applicability of an after-enacted amendatory act concerning another feature of the Missouri non-forfeiture statutes. The Court refused to apply said amendatory act, in part, saying: **"The law in force when the policy was issued controls (Liebing v. Ins. Co., 269 Mo., l. c. 521) and must govern in this case"** (l. c. 15). The company in the Alford case won. It successfully contended that the amendatory act was inapplicable. Its contention was opposite to the contention of plaintiff-in-error here. And the Missouri courts, without exception, have decided that the amendatory

act here, is inapplicable where, as here, the policy was issued before the amendment, although the loan agreement, as here, was made after its passage. Included among those cases are, Gillen v. Ins. Co., 178 Mo. App. 89; Paschedag v. Ins. Co., 155 Mo. App. 185.

Said section is valid (Cravens v. New York Life, 148 U. S. 583, affirmed 178 U. S. 389; Horton v. New York Life, 151 Mo. 158; Burridge v. New York Life, 211 Mo. 604).

In Mun v. New York Life, 181 S. W. (Mo. App.) 609 its constitutionality was pronounced "**a dead question.**"

II.

THE SECOND CONSTITUTIONAL QUESTION PRESENTED BY PLAINTIFF-IN-ERROR TO THE MISSOURI COURTS IS THAT THE MISSOURI COURTS REFUSED TO GIVE FULL FAITH AND CREDIT TO THE LAWS OF NEW YORK. The answer of plaintiff-in-error on this alleged constitutional question concludes as follows:

> "Defendant further states that said loan agreement and the pledge of said policy thereunder were valid and legal under the laws of the State of New York, and that the action of the defendant in canceling said policy and applying its sur-

render value to the payment of said loan was valid and legal under the laws of the State of New York, and that to deny to the defendant the benefit of said laws of the State of New York would be to refuse to give full faith and credit to the public acts, records and judicial proceedings of the State of New York, in violation of Section 1 of Article IV of the Constitution of the United States, and to deny to the defendant the equal protection of the laws, and to deprive the defendant of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.'' (9)

There is no merit in this contention for reasons among which are: (1) The Supreme Court of Missouri did not **deny the validity of the New York laws,** but only held **them inapplicable** under the facts proven. Hence faith and credit were not denied to the New York laws.

Smithsonian Institution v. St. John, 214 U. S. 19, 29;

Allen v. Allegheny Company, 196 U. S. 458, 464, 465;

Eastern Building and Loan Association v. Williamson, 189 U. S. 122;

Banhalzer v. New York Life Ins. Co., 178 U. S. 402.

The loan agreement itself reveals that it is a Missouri contract and it is **"of too much solemnity to be brushed away by loose and inconclusive testimony" (Northwestern Mutual v. Nelson,** 103 U. S. 544, 548 and 549).

Like all other written instruments, parol evidence is inadmissible to vary, qualify, contradict, add to, or subtract from it **(McAleer v. United States, 150 U. S. 424).**

(2) The Supreme Court of Missouri found, as a matter of fact, that the loan agreement was a Missouri contract. And in **Western Indemnity Company v. Rupp,** 235 U. S. 261, 275, this Court said:

> **"What is matter of fact in the state courts is matter of fact in this court upon review; and this applies where foreign law is in question in the state court as well as to any other issue of fact"** (cases cited).

(3) The Missouri court had power to decide which law, Missouri or New York law, applied under the facts proven, for it has been ruled in **Kryger v. Wilson,** 242 U. S. 171, 176, that

> **"The most that the plaintiff- in-error can say is that the state court made a mistaken application of the doctrines of the conflict of laws in deciding that the cancellation of a land contract is governed by the laws of the situs instead of the**

place of making and performance. But that, being purely a question of local common law, is a matter with which this court is not concerned'' (cases cited).

III.

THE PLAINTIFF-IN-ERROR'S THIRD ALLEGED CONSTITUTIONAL QUESTION IS FOUND IN ITS MOTION FOR A NEW TRIAL, AND READS:

> **''Sixth. That the court erred in directing a verdict for the plaintiff on the policy and thereby deprived the defendant of its right to a trial by jury, in violation of Section 28 of Article II of the Consititution of the State of Missouri, and deprived the defendant of its property without due process of law, in violation of Section 30 of Article II of the Constitution of the State of Missouri and of Article V and of Section 1 of Article XIV of the Amendments to the Constitution of the United States'' (234).**

There was no dispute as to the facts in this case and the trial court was bound to direct a verdict for defendant-in-error, and in doing so, the trial court did not deprive plaintiff-in-error of any constitutional right.

We submit that this question is meritless as may be seen from the cases cited under Point III of Points and Authorities herein.

The foregoing are all the constitutional questions presented to the Missouri court.

And plaintiff-in-error in its answer (10) alleges that non-payment of the loan was a condition of the insurance other than the non-payment of premiums, and that the same was violated, and, hence, defendant-in-error is not entitled to the benefit of the Missouri non-forfeiture statute. That question was fully discussed and settled on the first appeal in this case (Liebing v. Mutual Life, 269 Mo. 509).

And all the policy says in reference to the loan which can be material is **"that the company will, in conformity with its rules as then in force, loan amounts."** And **"that in any settlement of this contract all outstanding indebtedness * * * must be paid."** Said policy does not stipulate that non-payment of loans shall work a forfeiture of the insurance, and if it contained such a stipulation the same would be void, for the statute commands that the full three-fourths of the reserve, less **"any notes or other evidence of indebtedness to the company, given on account of past premium payments"** on said policy, shall be applied to purchase term insurance. We think the statute has reference to the violation of a valid policy condition. But the loan agreement stipulates that in the event of default in the payment of the loan the reserve may be appropriated to repay the same and the policy may be canceled.

Is the loan agreement a condition of the insurance? We think not. It is an invalid condition in a loan agreement. And it would be void as a policy stipulation.

We quote a few lines from syllabus 5 in the case of Smith v. Ins. Co., 173 Mo. 329, namely:

> **"An express agreement in the policy, or subsequently, that loans made the insured may be deducted from the net value of the policy in applying that value to extended temporary insurance will not authorize such deductions because that statute does not permit such a contract."**

IV.

THE LOAN AGREEMENT HERE IS NOT A CONTRACT INDEPENDENT OF THE POLICY, BUT IS CONTROLLED BY IT, AND IS SUBSIDIARY THERETO. THIS IS ESPECIALLY TRUE UNDER THE PECULIAR WORDING OF THE POLICY UNDER THE CAPTION "LOANS," WHICH READS:

> "After this contract shall have been in force three full years, **within sixty days after written application, and upon the assignment of this contract as security, the company will, in conformity with its rules as then in force,** loan amounts **within** the limits of the cash surrender value, with interest in advance, at the rate of 5 per cent

per annum; provided, (1) that the deposits be fully made to the end of the contract year in which the loan falls due; (2) **that in any settlement of this contract all outstanding indebtedness hereon to the company must be paid.**" (41.)

It is clear that the obligation to make the loan in this case is incurred by the terms of the policy itself, which is concededly a Missouri contract. And the right of the insured and defendant-in-error to the loan and the duty of the company to make it, the amount thereof, the rate of interest to be charged therefor, and all the terms and conditions of the loan, are provided for in the policy, and all the insured and defendant-in-error had to do was to apply, and when they did apply, the company was bound by its contract, to grant it upon the terms provided in the policy. The loan was therefore contemplated and formed part of the consideration when the policy was issued and the terms of the contract between the parties in relation to it are found in the policy itself. Hence, the Supreme Court of Missouri was bound to hold that the stipulation in the Dodge case and the case at bar are different (**Liebing v. Mutual Life**, 226 S. W. 902; **Head v. New York Life**, 227 S. W. (Mo.) 437. And was justified in saying too, that:

"**Undoubtedly the loan agreement was a Missouri contract for the reasons it was made here**

and for the reason that it was but subsidiary to the policy, which is admitted to be a Missouri contract, then said section 7897 would prevent the deduction from three-fourths of the net value of the policy as extended insurance, any indebtedness of the insured to the company except any indebtedness for past due premiums, and with that indebtedness alone deducted, the Blees policy is still in force, notwithstanding the cancellation of the company'' (p. 902).

The Missouri Court in this case distinguishes between the language used in the loan agreement in the case of New York Life v. Dodge, 246 U. S. 357, and the language used in the one in the case at bar. The word **''may''** was used in the Dodge loan agreement, while the word **''will''** is used in the loan agreement here. Other unlike features of the loan agreements are pointed out (p. 902). And we shall later refer to said loan agreement.

The Court in Scally v. W. T. G. & Co., 11 Cal. App. 138, says: **''The word 'WILL' * * * must have been understood in its proper sense as referring to the unconditional existence of the fact and not in the sense of 'may,' which imports a mere possibility.''** The word **''will''** is mandatory and excludes the idea of discretion that was ruled in Russell et al. v. Harrison, Secretary of State, 33 Okla. 225.

In the dissenting opinion in **New York Life v. Dodge**, supra, 381, it is said that:

> "**Even if the loan agreement be treated as an independent contract, it should, if facts are allowed to control, be held to have been made in Missouri. It was an act contemplated by the policy and was subsidiary to it, as an incident thereof. What was done by the officials at the home office was not making a new contract, but performing acts under a Missouri contract.**"

Lewis v. New York Life Ins. Co., 181 Fed. 433, was an action for recission of policy for failure to make a loan as provided in the policy. The right of recission was denied. The Court (p. 436) said:

> "**The fact is that the agreement for a loan was merely subsidiary to the main purpose of the policy, which was to insure the plaintiff for the benefit of the party designated.**"

In **McDonnell v. Ins. Co.**, 85 Ala. 401, the same principle was involved and the Court took the same view. That Court held that no instrument, including a substituted policy, a paid-up policy or loan agreement could change the terms of the original policy, and that all are subsidiary to the original policy. Such, too, is the rule in New York (Dannhauser v. Wallenstein, 169 N. Y. 199; Cole v. Ins. Co., 63 How. Pr. [N. Y.] 442). And we think it is the rule in all the sister states.

Stevens v. Mutual Life Ins. Co., 227 N. Y. 524, is inapplicable here for reasons, amongst which are: (1) That the loan agreement in the Stevens case was made in New York on the 16th day of May, 1914, after the amendatory act of 1913 of New York became effective, which provides that "**loans shall become due and payable and be satisfied as provided in the loan agreement**" (Vol. I, Laws of New York, 1913, p. 555).

No such law was in force when the loan agreement in the instant case was executed. And if policies could be converted and confiscated for the inadequate value styled "**cash surrender value**" and the right of redemption cut off, what was the necessity for the **Act of 1913?**

(2) In the Stevens' case it is said that "Nothing in the collateral note requires the company to exercise its option to cancel **on the very date it becomes due.** The agreement expresses the contrary intent. The cancellation is to be made **'as of the date of default.'** This implies action subsequent to that date" (p. 529).

The loan agreement in the instant case undertakes (contrary to Missouri statute) to give the oppressive authority to the company for the inadequate sum called "**cash surrender value**" to cancel, convert, confiscate, etc., the policy for nonpayment of the

loan on the 29th day of September, 1905, **but on no other date.** It does not permit, as in the Stevens case, those drastic steps to be taken at a later date, **"as of the date of default"** without notice to insured and defendant in error herein. And the policy makes no provision for confiscation at any date.

That plaintiff in error did not comply with the terms of the loan agreement is established by its own pleading and proof. Under the terms of the loan agreement, the loan was due on the **29th day of September, 1905,** and it was therein stipulated that

> **"In the event of default in the payment of said loan on the date hereinabove mentioned, the company is hereby authorized, at its option, without notice and demand for payment, to cancel said policy * * * or the company may, at its own option, renew the said loan for one year,"** etc.

It is important to note that said loan agreement does not provide, as many loan agreements do, that foreclosure may take place at a later date **"as of the date of default."**

But in plaintiff in error's later loan agreements the right is expressly reserved to cancel the policy **"as of the date of default"** at a date subsequent to the one on which the loan becomes due and payable; and in case of extension or renewal, the same right is reserved; that is, to cancel at a later date **"as of**

the date of default.'' Those amendments, and others, too, were evidently introduced in the new form on account of the ruling of the New York courts in the cases pleaded by defendant in error (14-30), and similar cases, the Stevens case excepted. The plaintiff in error's old form of loan agreement was used in the instant case, while the amended one was used in **Stevens v. Mutual Life,** 227 N. Y. 524.

Plaintiff in error did not exercise its option, if it had such, to cancel said policy on the date named, viz., **September 29, 1905,** for, according to its answer, it did not foreclose (confiscate) the policy until **November 15, 1905** (7). And, according to its evidence, it foreclosed (confiscated) the policy on **December 4, 1905,** or, as Mr. Trumpler puts it:

> **''Then I stamped the policy as having been paid on the 4th day of December, 1905, and, when that was finished, the policy of insurance No. 1207072 was canceled and surrendered to the company, and its customary cash surrender consideration had been applied to the payment of the loan and the policy ceased to be in force'' (177).**

Of course, in no event could cancellation take place on **November 15th or on December 4th, 1905,** for, when the loan fell due, on **September 29th, 1905,** the plaintiff in error was bound, under the terms of the

loan agreement here, to exercise the option of foreclosure or extend payment for one year, and the insured died within that time. And, while the plaintiff in error's expert witnesses deposed that the loan agreement was valid, yet they did not undertake to say (McIntosh's last deposition excepted, which, we think, is in direct conflict with the New York laws) that foreclosure could take place, **without notice or demand, at a time different from that named in the instrument.**

Mr. McCulloch, general counsel for the Equitable Life, stated that:

> "Under the law of the State of New York, the company had the right, **on the date mentioned**, to cancel and surrender the policy," etc. (182).

Mr. McIntosh, in his first deposition, testified to the same effect. This testimony could scarcely be different in view of the cases of Toplitz v. Bauer, 161 N. Y. 325, and Bailey v. Am. Deposit Co., 52 App. Div. (N. Y). 402, affirmed 165 N. Y. 672, and the other New York cases pleaded in defendant in error's amended reply.

It is to be noted that Mr. McCulloch did not change his statement in any subsequent deposition.

In a case in the Missouri court in banc (**Smith v. Ins Co.**, 173 Mo. 329), the Court said:

"Our law deems the subject of life insurance on that requires especial protection, and in this particular, it has provided that the policyholder shall have the benefit of the extended temporary insurance specified in section 5856, **'anything in the policy to the contrary notwithstanding.'** Therefore, though a policy should expressly declare that it was agreed between the insurer and the insured that the provisions of the statute relating to extended temporary insurance or commutation should not apply, still they would apply. **And if the parties could not in the beginning place themselves outside the policy of the law, they could not, by an amendment to the contract, do so**" (l. c. pp. 340-341).

Then again the Court said:

"And we hold, also, that the statute declaring that in ascertaining the net value of the policy it 'shall be computed upon the American experience table of mortality with four and a half per cent interest per annum, and after deducting from three-fourths of such net value any notes or other indebtedness to the company, given on account of past premium payments on said policy issued to the insured, which indebtedness shall then be canceled, the balance shall then be taken as a net single premium for temporary insurance for the full amount written in the policy,' **does not mean that indebtedness incurred by the assured for money borrowed from the company may also be deducted. The statute means only what it**

says, that indebtedness on account of past premium payments shall be deducted" (l. c. 341).

In **Burridge v. Ins. Co.**, 211 Mo., l. c. 178, the Court said:

> "We hold now, as we held then, that neither at the policy date nor by any supplemental subsequent contract, in legal effect an amendment to the policy, was it permissible to whittle away the mandate of the non-forfeiting statute requiring the net value of the defaulted policy to be applied to extended insurance. If the deductions made from that net value are notes coming within the statutory description, it is well enough, but if they fall within interdiction of the statute it is bad. It maters not whether the mischief be done when the policy was executed and springs from its own loins by use of a policy term forbidden by law, or whether it sprang up afterwards by indirection; because it ought not to be held that 'one can do in a circle what he can not do on a straight line'."

Then again the Court said:

> "In that case (meaning the Smith case), therefore, the scope and meaning of that cause of our non-forfeiture insurance statute was held in judgment in the stiffest sense, and this Court decided that the statute was mandatory; that the character of the indebtedness to be deducted from the net value before applying the residue to the

purchase of temporary or extended insurance must be looked to, and was limited by the clear words of the statute, 'to notes or other evidences of indebtedness to the company, given on account of past premium payments' on the policy issued to the insured, **and did not include notes and evidence of indebtedness arising in other ways''** (p. 172).

"Then from three-fourths of such net value there is to be taken away—what? All indebtedness? Not at all. There shall be taken away 'any notes or other evidence of indebtedness to the company **given on account of past premium payments on said policies'** '' (pp. 171, 172).

In **Gillen v. Insurance Co.**, 178 Mo. App., l. c. 97, the Court said:

"The theory of those cases goes to the effect that the non-forfeiture statute in force at the time the policy is issued enters into it as a parcel of the contract and operates to prohibit any subsequent change or modification thereof between the parties thereto affecting the application of the net value.

"It is also well settled that what cannot be done by the original policy contract—'a straight line' cannot be done by a supplemental or collateral contract, in this case a loan agreement, that is, 'cannot be done in a circle.' '' (Cases cited.)

The Court observed also that the non-forfeiture statute in force when the policy was issued entered into and **"became the supreme law of every policy."**

In **McCall v. Insurance Co.**, 196 Mo. App., l. c. 333, the Court said:

> "But plaintiff says the relation of pledgor and pledgee was created, and that relation was never changed, and insured had the right to pay off his debt at any time even after default, and having offered to do so, plaintiff may do so at this time. **This would be true if the loans were matters wholly separate and independent of the insurance contracts. But they are not.** As said in Burridge v. New York Life Ins. Co., 211 Mo. 158, loc. cit. 174, 109 S. W. 560, loc. cit. 565:
>
> " 'The loan and pledge contract in the case at bar is in no fair sense a contract distinct and independent from the policy. To the contrary, such loan and pledge was contemplated by the policy itself. It involved the policy; it may be likened unto an egg laid in the policy and subsequently hatched, i. e., was made in pursuance of its terms.' "

But by virtue of the amendatory act of 1903 (Laws 1903, p. 208), the company was permitted to deduct the loan from the net value of the policy and was permitted also to confiscate the policy, and, by virtue of the amendatory act alone, the Court recognized that under the law of pledges, in the absence of statute, the policy could neither be forfeited nor confiscated.

THE MISSOURI NON-FORFEITURE STATUTES HAVE BEEN IN FORCE A LONG TIME AND ARE FAIR AND JUST TO THE COMPANIES.

The Missouri non-forfeiture statutes have been in force since 1879, and from that time until the passage of the amendatory act of 1903 (Laws 1903, p. 208), said statutes have commanded that three-fourths of the net value of Missouri policies, less notes or other evidence of indebtedness to the company, given on account of past premium payments on said policies, shall be taken as a net single premium for temporary insurance for the full amount written in the policy, **anything in the policy to the contrary notwithstanding.**

The same statutes give the insurer the right to have deducted from the amount insured all forborne premiums (fixed at an ordinary life premium) with interest, compounded, at the rate of 6 per cent per annum.

Are those statutes harsh ones? We think not, for (1) they allow the insurer to convert to its own use one-fourth of the net value of the policy without in any way accounting therefor, though the same belongs to the insured. (2) They allow the insurer all defaulted premiums (on the basis of an ordinary life premium) with interest compounded

thereon. (3) They do not require the insurer to make any loan, but merely apprise the insurer, in advance, that if it does make a loan, unless to pay premiums, it cannot appropriate the reserve to repay it. (4) They do not require the insurer to give a cash surrender value at all and only require a paid-up value to be given in the event application is made therefor within sixty days after default.

THE LOAN AGREEMENT WAS A PERSONAL OBLIGATION OF THE INSURED AND HIS ESTATE AS WELL AS THAT OF DEFENDANT IN ERROR, WHO, THE EVIDENCE SHOWS, WOULD HAVE PAID THE SAME UPON DEMAND.

Upon the authority of many Missouri cases and one federal case the Court in Life Ins. Soc. v. De Lisle, 194 Mo. App. 47, 48, said:

> "The defendants insist that the loan agreements sued on here, when properly interpreted in the light of the facts and circumstances under which they were given, should not be construed as importing a personal obligation; that the legal effect of these instruments should be held to be that the loans are payable solely out of the proceeds of the policies and that the loan agreements merely pledged the policies to that purpose without personal liability on the pledgors. This same question came before this court in Gillen

v. Insurance Co., 178 Mo. App. 89, 98, where the question was examined and the authorities collected. The cases of Christensen v. Insurance Co., 160 Mo. App. 486, 496, 141 S. W. 6; Paschedag v. Insurance Co., 155 Mo. App. 185, 197, 134 S. W. 102; Smith v. Insurance Co., 173 Mo. 329, 340, 72 S. W. 935, and Bank v. Insurance Co., 81 Fed. 935, are there cited and quoted from as holding that loan agreements similar to the ones sued on here and given for the same purpose are personal obligations to repay the borrowed money in addition to pledges of the policies as collateral security. In the Gillen case the court said: 'We think, therefore, that the loan transaction and agreement had between the insured and the defendant created a personal obligation on the insured to pay the amount of the loan with interest and, as the pledge of the policy was invalid in so far as it authorized, or rather attempted to empower defendant to compel, the use of the net value of the policy in discharging the loan, such loan was, so far as this case is concerned, nothing but a personal obligation of the insured and plaintiff to the defendant.' The plaintiff in that case was the beneficiary in the policy who had signed a loan agreement along with the insured. Such also is clearly the holding of the Supreme Court in the Smith case, supra, and that case is binding on this court."

The evidence is uncontradicted, in the instant case, to the effect that if insured or defendant in error had

notice of the maturity of the fifth annual premium and loan the same would have been promptly paid.

On redirect examination, defendant in error testified:

> "Q. If you had notice of the maturity of the loan, what would you have done?
>
> A. Why, I would have seen why Mr. Blees didn't look after it, and if he didn't look after it, I would have looked after it myself" (63).

She further testified that she was financially able and would have paid the fifth annual premium, as well as the loan and interest on it, if she had been notified of their maturity or non-payment. She testified, too, that she "**owned considerable property at that time; I owned all the best corners in Macon, Missouri, at that time myself; I had a 780-acre farm out there; I owned nearly two-thirds of the carriage factory stock at that time**" (64, 65).

Should a policy be forfeited under such circumstances?

WE CONTEND THAT EVEN IF THE LAWS OF NEW YORK WERE APPLICABLE AND CONTROLLING, YET THE DEFENDANT-IN-ERROR WOULD BE ENTITLED TO A VERDICT AND JUDGMENT IN HER FAVOR, FOR THE FOLLOWING AMONG OTHER REASONS:

(1) Because under the New York laws the loan agreement is not a contract independent of the policy.

In **Cole v. Ins. Co.**, 63 How. Pr. (N. Y.) 442, 443, the Court held that changing the terms of an original policy in a substituting policy "**was an unwarranted and audacious act on the part of the insured, and not having been authorized by the terms of the original policy the plaintiff is not bound by the condition there imposed.**" We submit that changing the terms of the policy contract with the Missouri nonforfeiture statutes as supreme stipulations therein, by loan agreement, was in the language of the new York court "**an unwarranted and audacious act on the part of the insurer, and not having been authorized by the terms of the original policy, the plaintiff is not bound by the condition there imposed.**"

In **Dannhauser v. Wallenstein,** 169 N. Y. 199, the Court held that:

> "**A paidup policy payable to the wife of the insured, taken out by her in lieu of the original policy under a clause conferring that right, is not a new contract, but a continuation of the original.**"

And under the New York decisions and those, too, of the sister states, neither a substituting policy,

nor a paidup policy nor a loan agreement is a contract independent of the policy, but is subsidiary thereto.

(2) Because under the peculiar terms of the policy and the facts in this case, the following New York cases are parallel, namely: **Toplitz v. Bauer,** 161 N. Y. 325. In that case the policy was issued by the plaintiff in error here. There was a loan on the policy for which were given a promissory note and another instrument assigning the policy. It was like the loan agreement in this case and stipulated for payment on the **19th day of December, 1890.** Default occurred and the assignee of the policy did not exact strict performance.

The Court held that since the assignee did not on the **day fixed** take steps to collect by surrendering the policy to the company, etc., he could not do so without notice to the assignors. The Court, in part, said:

> "**The original contract under which the policy was deposited as security for the payment of the note undoubtedly did permit a sale or surrender without notice to the insured. But a stipulation of this kind may be affected by the subsequent conduct of the parties and by oral or written extensions of time, though not based on any actual pecuniary consideration**" (p. 332).

We quote from page 334 as follows:

> **"The pledgee could not, under these circumstances, surrender the policy without notice to the insured, although he could have done so had he elected to stand directly upon the terms of the original contract."**

Judgment for plaintiff was affirmed.

In **Bailey v. American Deposit Co.**, 52 App. Div. (N. Y.) 402, the policy and loan agreement were substantially the same as those in the instant case. As were the facts. The Court on page 406 observed:

> **"Having thus waived its right to dispose of the pledge upon the failure of payment on the day it became due it cannot insist upon a forfeiture without notice to the pledgors or without giving them reasonable opportunity to redeem the pledge. We think, therefore, that it was error for the learned court to dismiss the complaint upon the ground that there was no evidence of waiver of the forfeiture."**

This case was affirmed in 165 N. Y. 672.

(3) Because the law in force and pleaded by plaintiff in error, being **Section 16, Chapter 218, of New York Laws, 1897,** makes the laws of Missouri applicable and controlling under the facts proven and admitted in this case. Said section in part provides that the insurer

> **"may invest the funds required to meet its obligations incurred in such other states or foreign countries, and in conformity to the laws thereof, in the same kind of securities in such other states or foreign countries that such corporation is, by law, allowed to invest in in this state"** (9).

It is manifest that the obligation to make the loan in this case was incurred by the terms of the policy itself, which is concededly a Missouri contract. The plaintiff in error in its answer (9), quoting from the New York statute, says:

> "Any life insurance company may lend a sum not exceeding the lawful reserve which it holds upon any policy, on the pledge to it of such policy, and its accumulations as **collateral** security."

This New York law gives no authority for the cancellation or confiscation of a policy for nonpayment of a loan, but it merely given authority to make loans, but the amended **Statute of 1913** may give such authority. The material part of that amendatory act (Laws of New York, 1913, p. 555) provides that the **"loan shall become due and payable and be satisfied as provided in the loan agreement or policy."**

But prior to that time the law stood as pleaded in plaintiff in error's answer, which manifestly authorizes neither the cancellation nor confiscation of a policy for nonpayment of a loan. The law as amended

was presented to this Court by plaintiff in error in New York Life v. Dodge, 246 U. S. 357, the defendant in error's counsel having overlooked the fact that the change was not made until **1913.** We believe that had the attention of the Court been called to the prior condition of the law, the decision in the Dodge case would have been for defendant in error.

(4) Because under the New York law the transaction here is usurious and illegal (Secs. 370-373, Chap. 25, Volume II, Consolidated Laws of New York).

It clearly appears from the record that plaintiff in error complied with neither the terms of the loan agreement nor with the laws of New York. And, for many reasons, the loan agreement is invalid, and plaintiff in error's acts illegal under New York laws, as may be seen from the cases pleaded in defendant in error's amended reply, set forth on pages 14 to 30 of the transcript.

Certainly this Court ought not to give the defendant in error less than the home court of plaintiff in error would have given her had the action been brought in New York, and of this the plaintiff in error cannot complain.

VI.

IS THE LOAN AGREEMENT "UNDOUBTEDLY * * * A MISSOURI CONTRACT" AS HELD BY THE MISSOURI SUPREME COURT IN THIS CASE (LIEBING V. INS. CO., 226 S. W. 902) OR IS IT A NEW YORK CONTRACT AS CLAIMED BY PLAINTIFF IN ERROR.

To ascertain whether the pledge and loan agreement were made in Missouri or New York, let us examine the facts and the loan agreement itself.

Defendant in error testified (56) that neither the insured nor herself ever had any transaction with the home office in New York. The evidence, too, shows that the insured, defendant in error and plaintiff in error met at Macon, Missouri, and then and there entered into the loan agreement, a photographic copy of which is between pages 156 and 157 of the transcript. The plaintiff in error was represented by Dwight H. Payson, its Macon representative. **Was the pledge and loan agreement consummated in Missouri? And was Mr. Payson clothed with authority to enter into said contracts?**

Answering those questions in the similar case of **Haas v. Mutual Life,** 90 Neb. 808, Ann. 1913 B, and note, the Court said:

"The transaction with the agent was not a contract for the new insurance alone. It was for the payment of the surrender value of the policy as well. This part of the transaction was not completed until the delivery of the new policy evidencing the application of a part of the value as premium on a new policy, and the payment of the remainder due on the surrender value of the old. These acts were all performed in Nebraska. **The defendant is not entitled to sever the transaction and to say that because a portion of the agreement was carried out in New York, that portion of it which constituted a new insurance contract controlled and governed the legal status of the whole transaction.** Moreover, in this contract, as in every other contract, there must be a proposal and an acceptance, and that acceptance communicated to the person who proposed the contract or someone acting for him and in his behalf. The evidence shows that Haas made the proposal, but that he had no notice or knowledge of its acceptance until the delivery of the policy. **The only person with whom he dealt in the transaction was Winston. It was through him he made the proposal and it was through him he acquired knowledge of the acceptance.** If the policy had been sent direct to him by mail, thus evidencing the intention of the insurance company to part with its dominion or right to recall over it, the acceptance would probably be deemed completed and the constructive notice of such acceptance given by its deposit in the mails would be sufficient. But this is not the case here" (cases cited, including Missouri ones).

In **Manhattan Life v. Cohen,** 139 S. W. (Tex. Civ. App.) 51, the Court held that:

> **"Where life insurance policies belonging to a resident of Texas were assigned and delivered to the assignee's agent in Texas, the validity of the assignment was governed by the Texas laws and not by the laws of Georgia, where the assignee resided."**

This case is parallel, and affirmed by this Court in **234 U. S. 123.**

But if Mr. Payson was not clothed with authority to enter into the loan contract with the insured and defendant in error, then it was not consummated until the check was handed by Mr. Payson to the insured, for up to that time, it was subject to recall by defendant. Thus in **Ins. Co. v. Stratton,** 215 S. W. (Ky. C. A.) 416, the Court held that:

> **"Payment by check of an overdue premium is not made until the check is received at the office of the company, and cashed and applied to the extinguishment of the premium debt."**

We think, however, the fact that Mr. Payson had authority to consummate on behalf of the plaintiff in error the pledge and loan agreement in Missouri is scarcely debatable. But that is not the question, for he did actually consummate them there. Besides,

ratification of the act of an agent is equivalent to prior authority.

LOAN AGREEMENT.

The loan agreement commences:

"This agreement made this 12th day of October, 1914, between The Mutual Life Insurance Company, of New York, party of the first part, hereinafter called the Company, and Frederick W. V. and Mary S. Blees, parties of the second part," so that beyond question this agreement was made at Macon on the 12th day of October, 1904.

Then, again, the agreement says:

"The Company agrees to loan to the parties of the second part the sum of ninety-five hundred and fifty dollars, apportioned as follows": Four thousand two hundred ninety-one dollars and fifty cents was then and there agreed (not in New York, but in Macon) to be applied to pay an annual premium and $468.00 was then and there (not in New York, but in Macon) agreed to be applied to pay a year's interest in advance, and $4,790.50 was then and there (not in New York, but in Macon) agreed to be paid to the insured by **"Company's check."**

The defendant in error testified, **"It was agreed by both Mr. Blees and myself and Mr. Payson, first the premium was to be paid, and a year's interest in advance on the loan"** (60).

The check for the balance of the loan as the stipulation (88, 89) shows was mailed from New York to St. Louis and by the St. Louis office mailed to Mr. Payson, and by Mr. Payson delivered to the insured, who thereafter deposited said check in the National Bank of St. Louis, not for collection, but as a cash transaction (218, 219). And here we may observe that the fact that the bank in case it failed to collect the check had the right to charge the amount of it back against the account of insured, could not prevent the bank's acquiring title to the check by endorsement of insured, for this right to charge back affects neither title nor absolute ownership of the bank.

In the leading Missouri case of **Ayres v. Bank**, 79 Mo. 421, the Court held that:

> "If paper be deposited in or forwarded to a bank for collection, and in pursuance of a prearranged mode of dealing, the bank immediately places the amount to the credit of the depositor, and the depositor thereupon draws, or is entitled to draw, against the same as cash, this works a transfer of title, so that the depositor cannot afterward claim the paper: **and it is immaterial that if the paper is not paid the bank has the right to charge it back.**"

The same rule obtains in New York **(Metropolitan Nat. Bank v. Loyd,** 90 N. Y. 530).

Then, again, the agreement says:

> **"The receipt of the foregoing amount as a loan is hereby acknowledged upon the pledge as hereinafter set forth of Policy No. 1207072 in said Company."**

Then it was agreed that the loan should be repaid at the Company's Home Office in New York on the 29th day of September, 1905.

The thing pledged, namely, the policy, was delivered (not in New York, but in Macon) to Mr. Payson, the petitioner's Macon representative.

The loan agreement also says:

> **"In consideration of the amount of said loan the parties of the second part hereby assign, transfer and set over all of their right, title and interest in and to said Policy No. 1207072, issued by said company on the life of Frederick W. V. Blees, together with any and all moneys which may be or become payable under the same, to the company as collateral security for the payment of said loan, with interest."**

Then it stipulates that in the event of default in the payment of the loan on the **date named** in the loan agreement, the Company is, by the loan agreement, **"authorized at its option, without notice and**

without demand of payment, to cancel said policy, and apply the customary cash surrender consideration then allowed by the Company," which it fixes at $9,550.00.

The evidence shows that the minimum value of the policy, not to mention its speculative value, and without considering its distributive share of surplus was $13,170, or $3,620 in excess of the loan.

Finally, it concludes:

> **"In witness whereof, the said parties have executed these presents the day and year first above written."**

Then, under the insured's signature is, **"Macon, Mo.,"** and, under the respondent's signature, is **"Macon, Mo.,"** and to the right of the word "witness" are the signatures of "D. H. Payson," the petitioner's Macon representative, and "G. Eugene Lane." No other signatures appear thereon.

We have, therefore, a contract which expressly says that it is made on the 12th day of October, 1904, by which the Company agreed, not in the future, but then and there, to loan a given sum of money, which given sum of money was, not in the future, but then and there apportioned; that the policy was, not in the future, but then and there pledged, assigned, transferred and set over to plaintiff in error for the

loan, and the parties executed the loan agreement, not in the future, but at that time, namely, the 12th day of October, 1904.

Indeed, there was nothing to be done in the future but to deliver to the insured a check for $4,790.50 in payment of the balance of the loan, and this was attended to, not by the New York office, but by Mr. Payson of the Macon office.

The Company's check for the balance was delivered to the insured, not in New York, and not by the New York office, but at Macon, by Mr. Payson of the Macon office. This check was accepted and cashed by the insured, not in New York, but in Missouri.

Hence, if the loan agreement in this case is not a Missouri contract, we cannot conceive how a Missouri contract can be made, for it is certain that everything was agreed on in Macon on the 12th day of October, 1904, and the thing pledged was then and there delivered to the pledgee.

The plaintiff in error wrote the loan agreement and it used words in the present tense, and when it sent its representative, Mr. Payson, with an agreement reading that way, namely, in the present tense, and dated and signed at Macon, it was not an offer to enter into a contract that might or might not be accepted, but it was a contract entirely accepted and executed.

The trial and Supreme Court decided that the case of New York Life v. Dodge, 246 U. S. 357, is not applicable in the instant case. And later in Head v. New York Life, 227 S. W. 437, the Missouri Supreme Court said:

> **"The case of Liebing v. Mutual Life Ins. Co. (No. 21639), 226 S. W. 897, decided on December 13, 1920, and not yet reported, depends for distinction from this case upon the loan agreement being a Missouri contract and upon an expressed obligation to loan specified sums at stated periods. What has been said disposes of the questions determinative of the case. The judgment is affirmed."**

And, we think, that ruling is correct, for by the terms of the policy in the Dodge case, application for the loan was required to be made in writing to the New York office. The requirement reads: "**Application for any loan must be made in writing to the home office of the company**" (New York Life v. Dodge, supra, l. c. 368).

Blees, under his policy, was not required to apply to the New York office for his loan, and he did not do so. He applied to the Macon office and had all his transactions with that office.

Pursuant to the terms of his policy, Dodge made application for his loan, not to a Missouri office, but to the New York office, and he did not deliver his policy

to the insurer in Missouri, as Blees did, but forwarded it with his application, to the New York office for deposit there.

In the Dodge case the policy loan agreement says that the loan was made pursuant to the provisions of the policy. And Dodge was required also to give his **"assent to the terms of the policy loan agreement,"** paragraph 5 of which reads:

Paragraph 5 of Loan Agreement.

> **"5. That the application for said loan was made to said company at its home office in the City of New York, was accepted, the money paid by it, and this agreement made and delivered there; that said principal and interest are payable at said home office; and that this contract is made under and pursuant to the laws of the State of New York, the place of said contract being said home office of said company" (New York Life v. Dodge, supra, l. c. 371).**

As has been seen, Blees did not make application for his loan to the New York office. Neither did he agree that the loan agreement was there accepted nor the money paid there.

Quite the contrary, for it cannot be disputed that the loan agreement was made in Missouri; that whatever money changed hands was paid to Blees at Ma-

con, Missouri, by Mr. Payson of the Macon office. No money was paid to Dodge.

And there is no suggestion in the Blees loan agreement that it was **"made under and pursuant to the laws of the State of New York,"** nor any understanding that the place of said loan agreement was the home office.

Dodge gave instructions to the home office, which reads:

> "New York Life Insurance Company,
> 346 and 348 Broadway, New York.
> Re Policy No. 2054961.
>
> "Please deduct from the cash loan of $1,350.00 applied for on Nov., 1906, on the security of the above policy, an amount sufficient to pay present loan and prem. and int. to Oct., '07.
>
> Josiah B. Dodge,
> Leo F. Dodge."

(New York Life v. Dodge, supra, l. c. 371, 372.)

Blees gave his instructions to Mr Payson, the plaintiff in error's Macon representative.

There is not a single fact in the case at bar similar to those in the Dodge case unless the facts on which this Honorable Court decided that the Dodge policy was a Missouri contract.

In the instant case the policy stipulates:

> **"After this contract shall have been in force three full years, within sixty days after written**

application and upon assignment of this contract as security, the company will, in conformity with its rules as then in force, loan amounts within the limits of the cash surrender value, with interest in advance at the rate of 5 per cent per annum."

Hence, the right of Blees to the loan and the duty of the company to make it, the amount thereof, the rate of interest to be charged therefor were provided for in the policy. All that Blees had to do to secure his loan was to apply for it at any office, and when he did apply to the company at its Macon office, it was bound, by its contract, to grant it without any application to the home office, and if the plaintiff in error, after application made at its local office, refused to make the loan, Blees could have compelled plaintiff in error, under the contract, to grant it.

And, as has been seen, the application for the loan was made and the policy assigned in Missouri. The transaction should have then been considered closed, for the local office should have paid the money, having the power and authority to receive the premiums from the insured in Missouri, it should also be considered as having authority to pay the loan in cash to the insured at Macon.

The plaintiff in error did make the loan through its Macon office, and there is no suggestion either in the policy or in the loan agreement, or in the company's

letters, or in the company's answers (except the last answer), that the New York laws were applicable.

In the Dodge case application for the policy was made in Missouri, which application was accepted by the insurer at its home office in New York. The policy was issued in New York, but delivered to Dodge in Missouri, and this Honorable Court held that the Dodge policy was a Missouri contract and controlled by Missouri law. Why? Because both the first act, namely, application for the policy, and the last act, namely, delivery of the policy, occurred in Missouri. Such, too, is the situation here, even under the plaintiff in error's theory. For the first act, anmely, application for the loan, and the last act, namely, notice of acceptance of loan agreement (if acceptance was necessary and that the agreement was not previously closed in Missouri) and the actual delivery of the plaintiff in error's check by Mr. Payson, plaintiff in error's Macon agent, to Blees, all occurred in Missouri, and, besides, the check was cashed in Missouri.

Moreover, Blees was not obliged to accept the plaintiff in error's check, for he could have insisted on cash. The policy is not a check one. It is a "**gold coin**" contract. But he did accept the check in lieu of gold coin. Where? In Missouri. And his acceptance was the last act which closed the loan transaction. It was not completed before, unless, as defendant in error believes, the transaction was completed at Macon when

the loan agreement was signed and the policy delivered.

In **Crohn v. U. C. T.**, 170 Mo. App. 273, the Court held that:

> "**Until there is actual or constructive notice to the other party of the acceptance of a contract, it is still in the breast of the acceptor and may be revoked**" and is not binding.

In **Perry v. Ins. Co.**, 67 N. H., l. c. 295, the Court said:

> "**A proposition does not become a contract until the maker or his agent is notified of its acceptance**" (cases cited).

The Dodge case is quite different, for there was no money paid to Dodge. Dodge's loan on which his policy was forfeited was not sufficient to pay off the prior loan and annual premium then due.

With much confidence we assert that no case can be found deciding that the law of the place where the first and the last acts were performed were not applicable and controlling.

It has repeatedly been decided by this Honorable Court that where, as here, the contract is made by a New York company in another state, such contract is not subject to the New York laws unless the contract so provides.

In the case at bar there is no stipulation either in the policy or in the loan agreement making the New York laws an integral part thereof, as was done in the Dodge case, and hence it cannot be imputed that the parties intended to make the New York laws applicable or controlling.

In **Mutual Life v. Cohen,** 179 U. S., l. c. 267, 268, the Court said:

> "**The stipulation in this policy is different from that presented to * * * which was that it was 'a contract made and to be executed in the State of New York, and construed only according to the laws of that state.' There was a direct provision in respect to the contract itself and thus incorporated those laws into its terms.**"

In Lange v. New York Life, 254 Mo. 488, it was held that:

> "Where the application for a life insurance policy was made in New Mexico and the policy delivered there, it was a New Mexico contract, although the home office of the company was in New York; and the contract of insurance could be governed by the laws of New York **only by virtue of a provision to that effect in the policy.**"

Plaintiff in error was bound to make the loan in Missouri on the terms of the policy, the Missouri non-forfeiture statutes forming the supreme stipulations

thereof. There is nothing in the policy here as found in the Head and Dodge policies, requiring the loan agreement to be made in New York, etc. Parties can be compelled to pay their debts and meet their obligations by judicial process in the very state in which they incur them (Equitable Life Assur. Soc. v. Brown, 187 U. S. 308).

In **Hubbard v. Equitable Life Assur. Soc.**, 81 W. Va. 663, the policy stipulation concerning loans reads:

> "After this policy has been in force three years the society will make loans thereon at five per cent per annum, payable in advance, of the respective amounts stated in the following table, upon the due assignment of this policy to the society as collateral security for such loan" (p. 668).

When the insured applied for a loan he was handed an unwarranted loan agreement like the one in this case, which, with much good sense, he refused to sign. The loan agreement is set forth on pages 668 and 669 of the decision. In an action by the insured in that case against the company, the Court held that insured was entitled to the loan on the terms of the policy, and that the terms of the loan agreement were unwarranted. This case is reported also in **4 A. L. R. 886**, with a note which refers to similar cases.

Accordingly there was nothing to accept or reject in New York in the case at bar.

And even if the loan agreement in this case had been made in New York and valid under New York laws and not subsidiary to the policy, yet we submit that this Court should not compel the Missouri courts to enforce it, because said loan agreement contravenes the public policy of Missouri evidenced by Missouri statutes and decided cases.

In **Grossman v. Union Trust Co.**, 228 Fed. 610, the Court held that:

> **"A contract, though valid under the law of the place where it was made, will not be enforced in a jurisdiction where to enforce it would involve a disregard of the established public policy of that jurisdiction."**

This case was affirmed in **245 U. S. 412.** Cases to the same effect are too numerous for citation here.

VII.

The policy pledge and loan agreement are Missouri contracts, notwithstanding the stipulation in the policy and loan agreement that the sum insured and the amount of the loan were to be paid in the City of New York. This is especially true since both instruments are non-negotiable. For it is elementary that "A contract void by the law of the place where made, even though it is to be performed in another state by the laws of which it would be valid, is void every-

where, as the courts of no state will enforce the void contracts of another state.'' In other words, a void contract has neither a place of performance nor a forum.

In **Liverpool Steam Co. v. Ins. Co.**, 129 U. S. 397, it was urged that the law of place of performance controlled, but the Court rejected the view and, in part said:

> ''**The facts that the goods are to be delivered at Liverpool and the freight and primage therefor payable there in sterling currency, do not make the contract an English contract or refer to the English law the question of liability of the carrier for the negligence of the master and crew in the course of the voyage**'' (cases cited, p. 459).

In **Knights Templars & Masonic Mut. Aid Ass'n v. Greene,** 79 Fed. 461—a decision by Judge Taft—the association there contended that the laws of Ohio, being the state of its incorporation and of its home office, and, further, where the application for the policy was approved and the policy was issued and was payable, were applicable and controlling; while Sarah L. Greene, the widow of insured, contended that the laws of New York, where insured and she resided, were the applicatory and controlling laws.

In an intensely interesting opinion, the Court held that the New York, and not the Ohio, laws were applicable and controlling.

To the same effect is **Hatch v. Oil Co.**, 100 U. S. 124, and also **Black v. Zacharie & Co.**, 44 U. S. (3 How.) 483.

In **Jenkins v. Jarrett**, 70 N. C. 255, the Court held that:

> "Where a bargain is made for the purchase of goods, and nothing is said about payment or delivery, the property passes immediately."

In **Falls v. United States Sav. & Building Co.**, 97 Ala. 417, it was held that:

> "Though the mortgage given to secure the loan stipulates that it is made under and with reference to the laws of the state whose laws permit money to be loaned by a corporation at a higher rate of interest than 8 per cent per annum, if such corporation effects a loan to a citizen of Alabama **THROUGH A SOLICITING AGENT** in Alabama, the application for the loan, the subscription to the stock, the assessment of the value and the examination of the title of the property mortgaged to secure the loan, and the note and mortgage were all done and executed in Alabama—the application of the loan forwarded to the office of the corporation before it was acted on, and the money sent to a bank in Alabama, to be paid the borrower, constitutes an Alabama contract, which is governed by the laws of this state."

In **Wash. Inv. Ass'n**, 38 Or. 319,

> "application for a loan and stock was made at Dallas, Oregon, through one W. G. Wright, who represented that plaintiff had money for such investment, and the note and mortgage were there executed, acknowledged and delivered to the plaintiff. The mortgage, however, contains a provision that it is understood to be made with reference to and under the laws of the State of Washington" (p. 330).

Repayment was to be made in monthly payments "to the association, at its home office at Seattle, Washington" (p. 329).

The pivotal question was which law applied, Oregon or Washington. In holding that the law of Oregon controlled, the Court observed that:

> "The contract was made in Oregon and must be construed and enforced according to our laws. The application for stock and the loan was made in Oregon, to and by an association domiciled and doing business therein, **THROUGH A RESIDENT SOLICITOR.**
>
> "The mortgage was given upon an Oregon farm, and was executed and acknowledged here. The money was used here, and suit was instituted in the county in which the mortgaged premises are situated, as contemplated by the association when it acquired the license to do business in this state. All this notwithstanding the mortgage

stipulation to the effect that it is a Washington contract, clearly shows its Oregon nativity, and it is therefore solvable by the laws thereof" (341, 2—many cases cited).

In **Ins. Co. v. Woods,** 11 Ind. App., l. c. 347, 348, the Court said:

> **"An assignment of a policy, like an assignment of an open account, does nothing more than to transfer the property. The assignment of a chose in action is governed by the law of the place where the assignment is made."**

In **Burr v. Beckler,** 264 Ill. 230, Chief Justice Cartwright, upon the authority of many cases, said:

> "The note was payable in Ohio, but that is not a ground of distinction, because the place where the contract is made determines its validity and the place of performance affects only the time, mode and extent of the remedy."

In **Garrigul v. Kellar,** 164 Ind. 676, a negotiable promissory note was made in Illinois payable in Indiana. After referring to many applicable general principles and citing many cases, the Court said:

> **"Applying these general principles to the case in hand, it is our conclusion that the validity of the notes in suit as to the appellant, Lidia M. Garrigul, must be determined by the laws of Illi-**

nois, where it is alleged they were executed, notwithstanding the fact that the place of payment was in Indiana."

Later on in the opinion, the Court quotes approvingly from **Bank v. Chapman,** 169 N. Y. 538, which was an action on a negotiable promissory note made in Alabama, payable in Illinois, and the Court there held that the Alabama law controlled, and that because the note was void in Alabama it was void everywhere.

The Indiana Court quoted approvingly, too, from **Hauck Clothing Co. v. Sharpe,** 83 Mo. App. 385, and **Glass Co. v. Taylor,** 99 Ky. 24, being cases to the same effect.

In **Millard v. Brayton,** 177 Mass. 533, it was held that the policy was a Massachusetts contract, "Notwithstanding the stipulation in the policy that the premiums and the sum insured were to be **paid in the State of New York**" (l. c. 527, cases cited).

In **Ins. Co. v. Villeneuve,** 25 Tex. Civ. App. 356, it was held that the Texas statute providing a penalty for refusal of the insurer to pay the loss was controlling, "though the policy be made **payable at the home office** in another state which has no such law."

In **Ins. Co. v. Force,** 142 N. Y. 90, it was held that a charter party entered into at New York City be-

tween a citizen of that place and a foreign vessel owner to carry goods to a foreign port, is governed by the laws of New York, although, by the terms of the contract, the freight was to be paid on delivery of the cargo at the port of discharge.

In **Staples v. Nott,** 128 N. Y. 403, the Court said:

> **"But naming a New York bank as the place where the maker would provide for the payment of the note, did not characterize the contract one way or the other."**

In **Brown v. Am. F. Co.,** 31 Fed. 516, being a case involving a loan, the Court held:

> **"The law of the place where a contract is made, not that of the place of performance of the contract, is the law which determines whether the contract is void."**

In **Am. F. L. Mortgage Co. v. Sewell,** 92 Ala. 163, notes were made payable in New York; nevertheless, they were held to be governed by the laws of Alabama.

We submit, therefore, that the Missouri Court correctly held the law of the place of payment not controlling. If it were controlling, then policies would be governed by the law obtaining at the home office, for they are invariably payable there.

XI.

No new issues can be made nor new defenses asserted after the case comes down from the reviewing court for retrial. Before this case went to trial the first time, the defense founded on the laws of New York was open to plaintiff in error within the legitimate scope of the pleadings. It was too late on retrial to invoke the defense founded on the laws of New York. Such is the well-established doctrine of this Court.

In **Louis. & Nash. R. R. v. Higdon**, 234 U. S. 592, 598, the Court held that:

> "Attempts to inject Federal questions into the record by filing amended pleadings after the case has been remanded by the Appellate Court come too late to lay the foundation for review by this court (Mutual Life Insurance Co. v. Kirchoff, 169 U. S. 103), except so far as the Appellate Court gives consideration to, and passes upon, such questions when the case again comes before it" (Meiderich v. Lauenstein, 232 U. S. 236).

It is also the well-settled rule in Missouri. Thus, in **State ex rel. v. Reynolds**, 277 Mo. 14, the Court said:

> "Both by statute (Section 1848, R. S. 1909) and by the construction put on that statute by this court, amendments of the pleadings are to be liberally allowed, **but only upon condition that**

such amendment shall result in no substantial change in the defense made necessary or of the cause of action" (cases cited).

Again, the Court said:

> "Under these facts the Court of Appeals held that the trial court ought not to be convicted of error in exercising its discretion. That a discretion, we repeat, exists in the trial court under the provisions of section 1848, supra, and that an exercise of this discretion by a refusal to permit amendment will not be held error in a case wherein the amendment **substantially changes the defense**, is well settled. The cases urged by relator as being in conflict with what was ruled by the Court of Appeals, so far as they are at all apposite, hold this and no more. **The amendment requested was of such character as ordinarily to constitute a substantial change in the defense.** We conclude that the view taken by the Court of Appeals was correct."

In **Bange v. Legion of Honor**, 153 Mo. App., l. c. 167, 168, defendant relied exclusively on a forfeiture for nonpayment of a particular assessment after notice, and on that issue the plaintiff was nonsuited, and she appealed to the St. Louis Court of Appeals and succeeded in having the cause reversed and remanded. Thereafter, the defendant included, in an amended answer, a new defense—namely, forfeiture

on the ground of nonpayment of dues and a specified per capita tax; but the Court, on second appeal, held that this defense came altogether too late.

We quote from pages 167 and 168 of the opinion, as follows:

> "Had a forfeitue of the insurance been predicated on this ground in the first instance, it may be the argument would prevail, but as it is, defendant must be treated as having waived the matter, for it appears no such question was raised in the original answer nor until after the case had been tried and the judgment reversed on the former appeal. **After the cause was remanded defendant filed an amended answer by which, for the first time, it invoked a forfeiture for nonpayment of dues.** Plaintiff joined issues with defendant on the first answer, which set forth a forfeiture solely on the ground of nonpayment of contribution No. 132 after notice thereof, and a trial was had with respect to that matter. On that issue alone the Court on the former trial directed a verdict for defendant and thus entailed the expense and trouble of an appeal to this Court, which reversed and remanded the case, as will appear by reference to Bange v. Sup. Council Leg. of Honor of Mo., 128 Mo. App. 461, 105 S. W. 1092. There can be no doubt of the proposition that a forfeiture may be declared waived, if it appears the insurer, while in possession of all the facts with respect to the matter, omits to invoke it and induces the

beneficiary to enter upon the expenditure of a considerable sum of money or materially changes his or her position by litigating another matter relied upon as a defense. Such conduct on the part of the insurer introduces an element of estoppel and renders the waiver complete (2 Bacon on Benefit Societies [3 Ed.], Sec. 423; Carp v. Queens Ins. Co., 116 Mo. App. 528, 542, 544, 545, 92 S. W. 1137). **So it is in this case, defendant having relied exclusively upon a forfeiture for the nonpayment of contribution No. 132, after notice, on the former trial and appeal, will not now be permitted to invoke a forfeiture on a new and distinct ground with respect to the facts of which it was fully advised when the first answer was filed** (see Carp v. Queen Ins. Co., 116 Mo. App. 528)."

And the same rule obtains in the sister states.

Thus in the case of In re **Estate of Cook,** 143 Iowa 733, where, as here, a statute of another state was invoked after remand, the Court, in part, said:

"When the case got to that court, no new fact was presented save the **Nebraska statute** relied upon, and no claim of oversight or misfortune was pleaded. For aught that appears, counsel had knowledge of the Nebraska statutes from the beginning, but for some reason best known to themselves, they did not see fit to rely thereon. **That the former opinion was res adjudicata, not only as to the matters which were**

pleaded, but as to all matters necessarily involved and which might have been pleaded, is fundamental'' (cases cited).

Then quoting approvingly from **Zalisky v. Ins. Co.,** 114 Iowa 516, the Court said:

> ''The due and timely adjudication of the rights of litigants' demands that a cause of action or defense be submitted as a whole when known, and not by piecemeal, otherwise parties not offending as in this case may be eternally harassed, and the courts constantly engaged in passing upon points raised one at a time in a long course of litigation. We cannot lend our sanction to such a procedure. Where there is an opportunity for full presentation of all the facts in the case, the party relying thereon must make a disclosure thereof if known to him or suffer for a failure so to do. He cannot be permitted to conceal a part of his action or **defense,** or to negligently overlook it, and thus prolong indefinitely the final settlement of the case. **This proposition is so manifestly right that no citation in its support seems necessary''** (l. c. 736).

Then, again, the Court said:

> ''Having once had their day in court, and having been defeated, the trial court had no power to reverse the action of the court or to **permit an amendment for the purpose of bringing to the court's attention a statute of a foreign state an-**

> **nouncing another rule of law.** The law of the case was settled in the former appeal, and that **should have been the end of it**" (case cited). "When the law premise is once determined, it becomes the law of that case to the end of time unless set aside or vacated by proper proceedings. This cannot be done, however, **by amendment to the pleadings setting forth a statute of another state. That should have been done before the case came here for decision of the legal proposition**" (case cited, l. c. 737-8).

In **Mantle v. Dubney**, 47 Wash. 394, upon the reversal of the case and remand thereof, defendant made a motion for leave to amend his answer by pleading a section of the **statute of California**. The trial court refused to permit the amendment, which was approved on appeal. The Court said:

> "That part of the proposed amendment alleging that appellant's wife consented to the giving of the security is inconsistent with the answers of both appellant and wife and with the evidence and theory of the case as presented upon the first trial" (l. c. 395).

That is exactly the situation here, for the contention now that the New York statute is applicable is inconsistent with the previous theory that the Missouri statutes were applicable.

In **Barrett v. McAllister,** 35 W. Va. 103, the defendant, after the case came down for retrial, invoked as a defense the statute of frauds, but it was held too late. And it was likewise held that not having lodged the plea in its answer on the first trial it "**had thus waived the statute of frauds.**" And, "**Having waived the defense once, it is too late to avail themselves of it after the case has come back from the court of appeals**" (l. c. 116).

In **Williams et al. v. Banks et al.,** 19 Md., l. c. 36, the Court said:

> "To the claim of Renwick, the plea of the statute of limitations had been made, for the first time, after the cause was remanded; but in any view of the question, that plea could not be considered having been made too late."

In **Bassett v. Shepardson,** 57 Mich. 428, on the new trial defendant offered and was allowed to attack the appointment of plaintiff as special administrator as void for want of jurisdiction. The defense prevailed, but on review the Supreme Court held that the defense had been waived, because not set up in the first answer, and held, too, that the waiver could not be recalled.

To the same effect are City v. Muldoon, 20 Ky. L. R. 1576, and Sears' Ex'or v. Marshall, 83 Va. 383.

In **State v. Board of Co. Comm.**, 60 Neb., l. c. 570, speaking of change of defense, the Court said:

> "It is hard to conceive when litigation would end, if parties were permitted to try their action upon one ground at one time, and upon entirely different and inconsistent ground when the question had been determined adversely. It has been announced in this jurisdiction, as well as in many others, **that where a party gives a reason for his decision and conduct touching a matter involved in controversy, he is estopped after litigation has begun from changing his ground and putting his conduct upon another and different consideration. The foregoing may be regarded as a settled rule of law of this Court**" (l. c. 570—cases cited).

To the same effect is **Murphy v. Plankington Bank**, 20 S. D. 178.

In **Gillespie v. Fulton Oil Co.**, 244 Ill., l. c. 14, it is said:

> "**A complainant cannot present his case, or a defendant his defense, by piecemeal.**"

In **Ebelhar v. G. A. S. A.**, 119 S. W. (Ky. C. A.) 220, the defendant attempted to invoke a new defense which the trial court denied. The ruling was approved. The Court said:

> "The court correctly refused to allow him to file this pleading, even though all the matters set

forth therein constituted a defense, for to permit such practice would make litigation interminable. **If the matter set forth in the amendment constituted a defense—which we do not decide—on the last trial it was on the first.''**

To the same effect is **Wood v. Kerkeslager**, 227 Pa. 536.

In **Brewster v. Meng**, 76 Neb. 560, the Court said:

> ''Whatever rights the parties may have acquired from such finding existed when this case was first tried, and, if material to the interest of the parties, should have been presented at that time. **A case cannot be tried by piecemeal. There must be an end to litigation''** (l. c. 561-2).

The mandate in **Butler v. Thompson**, 52 W. Va., l. c. 317, reversed and remanded the cause **''for further proceedings therein to be had, according to the rules and principles stated in the written opinion aforesaid, and, further, according to the rules and principles governing courts of equity.''**

The defendant was allowed to file an amended answer, embracing a new defense, which act was condemned on appeal. The Court said:

> **''The principle is as old as the law and rests not only upon reason of sound public policy, demanding a cessation of a controversy at the end of one full and fair trial, but upon principles**

of logic as well. Whether the final decision of the court was right or wrong, it is unalterable and must stand'' (l. c. 313).

In **McAllister v. Clark,** 33 Conn. 252, it was held:

> **''A right in defendant, as often as one plea is decided against him, to change it for another, would render litigation interminable and not to be endured.''**

The decision on the former appeal in the case at bar held that the Missouri nonforfeiture statute **''disposes of the whole matter,''** and the mandate directed the trial court **''to proceed with the cause in a manner not out of accord with the opinion of the court herein delivered.''** And the trial court was guided by the opinion and mandate.

In **Continental Gas Co. v. Semple,** 112 S. W. (Ky. C. A.) 1122, it was held that an amendment to include the defense that the insured had more accident insurance than his application disclosed was properly refused.

In re Quaker Realty Co., 127 La. 207, quoting approvingly from the Court of Appeals, the Court said:

> **''All questions of liability urged or that could have been urged at the first hearing are concluded, otherwise there could be no end to litigation.''**

In **Hutchinson v. Railway,** 98 Kans. 225, the Court held that:

> "The proceedings considered, and held that the defendant is estopped by its answer to the petition and by adjudications of the court in its favor in former appeals from asking that the rights of the parties be now determined by federal statutes claimed to be applicable."

The Court observed (p. 226) that:

> **"The defendant cannot be allowed to settle the law of the case piecemeal any more than it can be allowed to settle the facts in that way"** (case cited).

That case found its way to this Court **(248 U. S. 363),** and in dismissing the writ this Court, in part, said:

> **"The federal question was not seasonably raised"** (many cases cited).

We call attention to the fact that the defendant in error in her original petition stated:

> **"That on or about the 12th day of October, 1904, at the City of Macon, County of Macon, in the State of Missouri, Frederick W. V. Blees, the insured, borrowed from the defendant on the security of said policy the sum of nine thousand five hundred and fifty dollars"** (94).

And the defendant in error from the beginning based her case entirely upon the Missouri nonforfeiture statutes. The amendments, and the only amendments, made by defendant in error in her petition when the case came down for retrial was to scale down the credit given plaintiff in error for the foreborne annual premium from $4,291.50 to $2,228.94, the latter sum is the amount of an "ordinary life premium," which is the correct credit under Section 7899, R. S. Mo. 1899, now Section 6153, R. S. Mo. 1919, and to plead matters concerning the vexatious refusal of the plaintiff in error to pay the policy in harmony with the ruling in Fay v. Ins. Co., 268 Mo. 373. Defendant in error neither changed her cause of action nor invoked different laws; neither did she make any averments which would warrant plaintiff in error in changing its theory and invoking a new defense. The plaintiff in error takes the position that because defendant in error filed an amended petition that it is authorized to invoke a new defense, but, answering a similar question, the Supreme Court of Illinois in Hook v. Richeson, 115 Ill., l. c. 445, said:

> "Counsel contend, however, that complainants were allowed to file a supplemental bill after the cause was remanded the second time, and that this raised new issues of fact, and that in order to meet those facts Hook was entitled to set up the matters alleged in the cross bill. This is a

misapprehension. It has been seen the supplemental bill simply showed the death of McFall, one of the defendants, since the last hearing, and that before his death he conveyed his lands involved in this litigation to his co-defendant, McGuire. **No new parties were made, and no new matters were alleged affecting the merits of the controversy.''**

CHANGE FROM ''LAW TO LAW'' IS A FATAL DEPARTURE AT ANY TIME.

Deserting Missouri law in part and invoking New York law was a clear departure from **''law to law,''** as has been held in the case of **Union Pacific Railway v. Wyler,** 158 U. S. 285, cited and followed in United States v. Dalcour, 203 U. S. 408, 422, 423; Moliter v. Railroad, 180 Mo. App. 84, 88, and Newberry v. Railroad, 271 Fed. 117, 119.

In that case this Court held that a change from the general law of master and servant to statutory law was a departure and not permissible, even by consent of opposite party. The Court refers to many cases and quotes approvingly from Saunders on Pleading and Evidence, pp. 806, 807, as follows:

> '' 'A departure may be either in the substance of the action **or defense or the law on which it is founded.' ''**

And quotes to the same effect from Chitty on Pleading, pp. 674, 675.

And also from Gould on Pleading, pp. 423, 424, as follows:

> " 'Where the matter first alleged as the ground of action **or defense** is pleaded as at common law any such pleading by the same party, supporting it by a particular custom, is a departure.' "

XII.

LITIGANTS ARE LIMITED TO DEFENSES NAMED BEFORE INSTITUTION OF ACTION.

Before this action was instituted, the plaintiff in error put nonliability on the ground that "there is no decision of the Supreme Court of Missouri conclusively deciding the points arising in the present case," and upon that ground alone. The New York law was not named as a defense (130, 131). And if there is any proposition more firmly established than any other, it is that **"An insurance company, when sued upon a policy, cannot, after the beginning of suit, make any objections to paying the loss that are different from or additional to those which it stated before."** In support of which, we cite the well-reasoned case of Shearlock v. Mutual Life, 193 Mo. App. 430, in which the defenses were want of timely notice

and proofs of death and bar of the statute of limitations. It was there held that the defendant was estopped from setting up those defenses (having failed to name them), because it had put the plaintiff to the trouble and expense of furnishing proofs of death. The applicable cases are fully reviewed.

And in Taylor v. Columbia League, 135 Mich. 231, the Court held that:

> **"A refusal by the officers of a benefit association to pay a death claim solely on the ground that the deceased had never paid an assessment constitutes a waiver of other defenses known to them at the time."**

In Snyder v. Mystic Circle, 122 Tenn. 248, the Court held that:

> **"Where a party gives a reason for his conduct and decision touching anything involved in controversy, he is estopped, after litigation is begun, from changing his ground and putting his conduct on another and different ground."**

In Insurance Co. v. Baugh, 60 Neb. 348, it is held that:

> **"Where, in a controversy over the liability of an insurance company, under a policy of insurance after the loss has occurred, certain grounds are assigned as a reason for denial of liability,**

> **the company, after litigation has begun, cannot be heard to urge other and additional grounds as reasons for their refusal to pay the loss sustained."**

In McCormick v. Ins. Co., 163 Pa., l. c. 193, quoting approvingly from Brink v. Ins. Co., 80 N. Y. 113, the Court held that:

> **"Every consideration of public policy demands that insurance companies should be required to deal with their customers with entire fairness and frankness. They may refuse to pay without specifying any ground, and insist upon any available ground, but when they plant themselves upon a specified defense, and so notify the assured, they should not be permitted to retract after the latter has acted upon their decision as announced, and incurred expenses in consequence of it."**

In Insurance Co. v. Elliott, 60 Ind. App. 112, the Court held that:

> **"Where a livestock insurance company with knowledge of all the facts respecting the death of the animal insured, rejected the claim after proof of loss solely upon the ground that the animal had been killed by an officer of the law, it thereby waived all other grounds of defense, including the plaintiff's failure to give notice of the animal's illness."**

In Insurance Co. v. Ray, 196 Ala. 425, the Court held that:

> **"By denying liability on one ground of forfeiture alone, the insurance company waives all other grounds of forfeiture or breaches of the conditions of the policy."**

In Ward v. Ins. Co., 69 Ore., l. c. 352, the Court quoting from the case of Railway v. McCarthy, 96 U. S. 258, said:

> **"Where a party gives a reason for his conduct and decision touching anything in action on a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and different consideration. He is not permitted thus to amend his hold. He is estopped from doing it by a settled principle of law."**

In Milling Co. v. Ins. Co., 127 Iowa 314, the Court held that:

> **"Where a mutual insurance company denied liability for a loss, solely on the ground that the policy was suspended by reason of nonpayment of an assessment illegally levied, it could not, after suit was begun and costs incurred, amend its answer and base its non-liability on a different ground."**

In Jacobs v. M. S. R. Co., 115 App. Div. (N. Y.) 499, the Court held that:

> **"Where a corporation, sued to obtain a judgment setting aside cancellation of a lease, has answered that the lease was canceled because the lessee made default in paying rent, it will not, after a delay of eighteen months, be allowed to amend and set out that the cancellation was made because the lease was fraudulently entered into by directors interested in the result, when all of the real facts were known at the time of the original answer."**

Cases to the same effect are now almost too numerous for citation.

XIII.

The stipulation in the loan agreement for forfeiture and confiscation of the policy for nonpayment of the loan is void. Such stipulations have been denounced as void under the common law by the courts of the sister states; and they are null, too, under the civil and Roman laws. As may be seen from the authorities cited under Point XIII of Points and Authorities herein, we believe that a few words from the case of Livingston v. Story, 36 U. S. 351, will be sufficient. These words are:

> **"The law is express; the creditor does not become the proprietor by failure of debtor to pay. Any clause to the contrary is null."**

XIV.

And in the absence of the Missouri nonforfeiture statutes, defendant in error is entitled to recover for the following other and further reasons, namely:

(a) **The policy contains no forfeiting stipulation for failure to pay a loan, and the Court will not supply one.** This question has often been decided by the Missouri courts (Tetley v. McElmurry, 201 Mo., l. c. 394; Dezell v. Casualty Co., 176 Mo. 253). The question has also often been decided by the courts of the different states, as may be seen from the well-reasoned case of Haas v. Mutual Life, 84 Nebr. 682, in which twenty-eight cases are cited.

(b) **The policy stipulates:**

> **"That in any settlement of this contract, all outstanding indebtedness to the company hereon must be paid."**

And if the plaintiff in error is not obliged to stand for the collection of the loan on the promise in the policy, but allowed to forfeit and confiscate the policy for nonpayment of the loan, as provided in the loan agreement, then, we submit, the stipulation in the policy becomes a delusion and a snare. There is a clear repugnancy between the policy and loan agreement, for the policy expressly provides for the col-

lection of the loan in any settlement of the policy, and, of course, also the insured and defendant in error were personally liable for the indebtedness (**Gillen v. Ins. Co.**, 178 Mo. App. 89; **Equitable Life v. De Lisle**, 194 Mo. App. 42). This is what is expressly provided in the policy, and what warrant has the plaintiff in error in asking this Court to rewrite the policy and add words and phrases thereto to work a forfeiture.

In **Cole, Admr., v. Ins. Co.**, 63 How. Pr. Rep. (N. Y.) 442, the policy contained no forfeiture provision for nonpayment of premium or loan, and the provision of the loan agreement forfeiting the policy for nonpayment was held invalid. The Court said that the forfeiture stipulation in the premium or loan agreement **"was an unwarranted and audacious act on the part of the insurer, and not having been authorized by the term of the original policy the plaintiff is not bound by the conditions there imposed."**

And so it is in this case.

(c) That the incontestability clause in the policy shuts off the defense based upon nonpayment of the loan is well settled, as may be seen from the cases cited under subhead (c) of Point XIV of Points and Authorities herein.

(d) **Concerning loans, the promise was to make them in conformity with plaintiff in error's rules as**

then in force (41). **There is no reference whatever to the loan agreement in the policy. Neither is attached to the policy, set forth therein nor indorsed thereon. Hence, neither is a part of the policy, and upon neither, we think, can a forfeiture be predicated.**

If the plaintiff in error required the loans to be made pursuant to the terms of a loan agreement, it would have been an easy matter for it to have said so in the policy and attached a copy thereof to the policy.

And upon what authority has plaintiff in error required the insured and defendant in error to sign an agreement containing drastic forfeiting provisions **"without notice and without demand?"** Such harsh forfeiture stipulations are not enforced in chattel mortgages, deeds of trust or any other instrument, for neither notice, demand nor foreclosure can be waived.

The loan agreement cannot enlarge on the policy. In the much cited leading Missouri case of Longenfelder v. Brewing Co., 103 Mo., l. c. 593, the Court, among other things, said:

> **"What we hold is that when a party merely does what he has already obligated himself to do he cannot demand an additional compensation therefor, and, although by taking advantage of the necessities of his adversary he obtains a promise for more, the law will regard it as nudum**

pactum, and will not lend its process to aid in the wrong.''

We repeat that with respect to loans the agreement was that they should be made in conformity with the plaintiff in error's rules in force when the policy was issued. That it is upon these rules —and these rules alone—that the right of forfeiture for nonpayment of a loan can be predicated is not fairly debatable. The defendant failed to plead or prove said rules—if it had any—although it is elemental that where a forfeiture is relied on its conditions must be pleaded and proven with technical accuracy and completeness.

In Chadwick v. C. of T. Alliance, 56 Mo. App., l. c. 474, the Court wrote:

> ''Where a forfeiture is relied on, its conditions must be pleaded and proven. The answer seeks to plead such a forfeiture by stating that by the constitution and laws of the order certain assessments and dues were to be paid by the deceased, while a member, at certain dates, and that he failed to do, which, under such laws, worked a forfeiture. The answer does not in terms state that those provisions of the constitution and by-laws were in force when the certificates sued on were issued, nor that the certificates were issued subject to such subsequent changes in the constitution as the society might

make. Unless **one or the other** of these conditions existed the certificate was not affected by subsequent changes in the constitution."

In Burchard v. W. C. T. A., 139 Mo. App., l. c. 622, the Court said:

> "When a forfeiture of an insurance policy is claimed as a justification for not paying it, the existence of the precise condition which, by the terms of the contract, worked its termination, must be clearly shown. If such condition be failure to pay an assessment upon the membership, it must be made to appear that such an assessment was made **by the persons and under the conditions and for the amount provided in the contract**" (cases cited).

Where is there any allegation or proof in this case that the loan was made in comformity with the plaintiff in error's rules then in force? What are the terms of those rules? Do they provide for appropriating the reserve and cancellation of the policy? It was upon their terms the loan was to have been made.

(e) Under the policy, the insured was entitled to his "**distributive share of surplus,**" and it is the law not now to be questioned that the "**surplus**" must be valued and applied in buying extended insurance for lapsed policies in the same manner as the "**reserve**" (see cases cited under subhead (e) of Point XIV of the Points and Authorities herein).

(f) It is well settled that the reserve values of policies are not their true values. Indeed, they do not constitute even the minimum, not to mention the speculative values of policies (see cases cited under subhead (f) of Point XIV of Points and Authorities herein).

An interesting case is **Palmer v. Mutual Life Ins. Co.**, 121 Minn. 395, where a loan was obtained on the policy with the forfeiting words found in the loan agreement here. Cancellation and confiscation of the policy was attempted there, as here. These acts were held "**invalid, and hence the policy was still in full force.**" And held, furthermore, that: "**The evidence held to sustain a finding that the lowest value of a paid-up life insurance policy pledged to the insurer to the amount of a loan was $1,986.25; held also that the pledge agreement stipulating that, in case of default in the payment of, the policy might be canceled or forfeited by the pledgee for a sum more than $500 less than such value is invalid, and a cancellation attempted under such agreement is ineffective.**"

And this, of itself, renders the pledge invalid and the transaction usurious under the Missouri statutes, for parties cannot contract for interest at a rate beyond 8 per cent per annum (Sec. 6492, R. S. Mo. 1919). And a contract for a higher rate renders "**any mortgage or pledge of personal property or any lien whatsoever thereon * * * invalid and illegal**"

(Sec. 6496, R. S. Mo. 1919). The rate of interest in New York is 6 per cent per annum (Sec. 370, Chap. 25, Vol. II, Consolidated Laws of N. Y.). Any in excess thereof renders the transaction illegal and "**the Court shall declare the same to be void and enjoin any prosecution thereof and order the same to be surrendered and canceled** (Sec. 373, Chap. 25, Vol. II, Consolidated Laws of N. Y.).

We think we have shown by uncontradicted expert actuarial testimony that the so-called "**customary cash surrender consideration**" is not even the **minimum value** of the policy, not to mention its **speculative value,** which speculative value is recognized by all the courts so far as we have been able to find. This being so, an article worth more than the legal rate of interest is shown to have been converted in this case and, hence, the transaction cannot be said to be other than usurious.

CONCLUSION.

The positions of plaintiff in error in this case are absolutely amazing. When plaintiff in error came into Missouri and obtained a license and registered and agreed to be bound by and comply with its laws, it was upon these terms that it was allowed to come into Missouri to transact its insurance business.

When the policy in the instant case matured plaintiff in error based nonliability on Missouri law, but when this law proved ineffectual it sought for the first time to withdraw itself, not by policy or policy loan agreement, as in the Head and Dodge cases, but by answer from the limitation of the nonforfeiture statute of Missouri, while, at the same time, obtaining all the advantages of its license.

On second trial it undertook to dictate the law under which this case should be determined. And it asked the Missouri Supreme Court that the case be reversed outright, which was tantamount to asking that the defendant in error be denied the benefit of both the Missouri and New York laws and other defenses.

If the insurer can, by answer, withdraw itself from Missouri law, then Missouri beneficiaries must in every case of dispute become involved in an expensive contest. Foreign law must be pleaded and evidence thereof given and the rights of Missouri beneficiaries may arise or fall as has seemed best to the courts of the foreign state and its legislators. Their views may be reasonable and just, but where the savings of so many Missouri people are invested in insurance, it is scarcely to be expected that they will prefer to have them dealt with by laws in the making of which they have had no voice.

Recognizing the fact that corporations undertaking to do business beyond the territorial limits of the states creating them, do so only by comity, Missouri, like the sister states, as was its place and duty, has protected its citizens by declaring on what terms these foreign corporations shall be permitted to do business within its borders. Can this be all nullified by answer, and a contract enforced which is injurious to public rights, contravenes public policy and violates public law? To thus hold would be to give foreign insurance companies a decided advantage over Missouri insurance companies and practically nullify the statute passed by the Legislature for the protection of the people of this state.

Now, the loan in this case, under Missouri law, was a splendid investment for plaintiff in error, for without it plaintiff in error would have to pay the face amount of the policy without the deduction of the sum of $2,228.94, and interest, allowed by Missouri nonforfeiture statute for foreborne premium. This because upon payment of the third annual premium the table of values in the policy (43) gives ten years extended insurance. And it is not true that policies have no value except the cash surrender value guaranteed in the policy, even if it equals the full reserve. But in this case the policy is short $2,397.93 of the full reserve of $11,947.93 (137).

It is clearly demonstrated by the policy itself that the plaintiff in error had in its hands funds belonging to the insured and defendant in error far in excess of the cash surrender value, for, under the table of values in said policy, upon payment of the fourth annual premium, the paid-up value is $522.00 per thousand, or a total of $26,100.00 paid-up insurance, which, calculated under the American 3 per cent, is of the cash value of $263.40 per thousand (138, 139), or a total cash value of $13,170.00, being $3,620.00 in excess of the loan; and calculated under the actuaries' 4 per cent, is of the cash value per thousand of $223.71 (140), or a total cash value of $11,185.50, being $1,635.50 in excess of the loan. How could plaintiff in error set aside $11,185.50 of the insured's money for paid-up insurance if it had only $9,550.00 belonging to him?

Again, plaintiff in error had in its hands provisionally held as surplus the sum of $10.38 per thousand, or a total of $519.00, which surplus under settled law must be valued and applied at the date of lapse to purchase extended insurance, anything in the policy to the contrary notwithstanding (U. S. Life v. Spinks, 126 Ky. 405—which is said to be an "admirably written" decision in Warren v. Postal Life, 148 N. Y. Supp., l. c. 1026).

Besides, policies have speculative values which the courts have often recognized. That the doctrine is

sound is proven by the instant case. It appears clearly that the cash surrender value in this case is not even the minimum, not to mention the speculative, value of the policy, and since interest is the basic rule for the measure of damages and gives full compensation for delay in paying a loan, the stipulation in the loan contract here for the confiscation of the policy is obviously usurious and in the nature of a penalty and hence the pledge is void.

The Missouri Supreme Court has left undecided virtually all the questions involved in this case. Nevertheless, that court is obviously not inclined to deprive defendant in error of a decision on all the questions fairly involved, as appears from the majority opinion. There Judge Woodson does not say that the defendant in error is not entitled to have determined the question of waiver of the New York laws for failure of plaintiff in error to have timely invoked them. What Judge Woodson says is that:

> "I have not paid any attention to the proposition of the plaintiff that the company waived the benefit of the New York laws by not pleading them in the first instance. I think, if the loan agreement was a New York contract, its effect ought to be determined by the New York laws, and if it is a Missouri contract, by our law. Still I do not say there is anything in that point. **I simply have not investigated it.**"

And Judge Graves concludes his dissenting opinion as follows:

> **"The judgment is reversed, and the cause remanded, to the end that the trial court, in view of what we have said, may be able to * * * direct its jury upon the real live issues in this case."**

The defendant in error has, we think, a meritorious case, all the equities are with her, and we confidently look for either a dismissal of the writ of error or an affirmance of the judgment. But should the writ of error be not dismissed or the judgment affirmed, then we ask this Honorable Court to reverse and remand the cause for retrial.

Respectfully submitted,

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Received copy of the foreging brief

this 6th day of April, 1922.

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Note:—This brief was printed before receiving any brief on the merits from counsel for plaintiff in error.